

(23)
No. 95-813-CFX

Title: Brad Bennett, et al., Petitioners
v.
Michael Spears, et al.

Docketed:
November 24, 1995

Court: United States Court of Appeals for
the Ninth Circuit

Entry Date

Proceedings and Orders

Nov 21 1995	Petition for writ of certiorari filed. (Response due February 26, 1996)
Dec 19 1995	Order extending time to file response to petition until January 25, 1996.
Dec 19 1995	Brief amici curiae of California, et al. filed.
Dec 20 1995	Brief amici curiae of Pacific Legal Foundation, et al. filed.
Dec 21 1995	Brief amici curiae of National Association of Home Builders of the U. S., et al. filed.
Dec 21 1995	Brief amici curiae of Association of California Water Agencies, et al. filed.
Jan 22 1996	Order further extending time to file response to petition until February 26, 1996.
Feb 26 1996	Brief of respondent United States in opposition filed.
Mar 1 1996	Reply brief of petitioners filed.
Mar 6 1996	DISTRIBUTED. March 22, 1996
Mar 25 1996	Petition GRANTED. SET FOR ARGUMENT November 13, 1996. *****
Apr 23 1996	Order extending time to file brief of petitioner on the merits until May 24, 1996.
May 21 1996	Brief amici curiae of Pacific Legal Foundation, et al. filed.
May 22 1996	Brief amici curiae of American Forest & Paper Association, et al. filed.
May 23 1996	Joint appendix filed.
May 23 1996	Brief of petitioners Brad Bennett, et al. filed.
May 23 1996	Brief amici curiae of American Homeowners Foundation, et al. filed.
May 23 1996	Brief amici curiae of California, et al. filed.
May 23 1996	Brief amici curiae of American Farm Bureau, et al. filed.
May 24 1996	Brief amicus curiae of Texas filed.
May 24 1996	Brief amici curiae of Washington Legal Foundation, et al. filed.
May 24 1996	Brief amici curiae of Nationwide Public Projects Coalition, et al. filed.
May 24 1996	Brief amici curiae of National Association of Home Builders of the U.S., et al. filed.
Jun 26 1996	Motion of petitioners and amici curiae California, et al. to permit California, et al. to participate in oral argument as amici curiae and for divided argument filed.
Jun 26 1996	Order extending time to file brief of respondent on the merits until July 15, 1996.
Jul 15 1996	Brief of respondents Michael Spear, et al. filed.
Aug 13 1996	Reply brief of petitioners Brad Bennett, et al. filed.
Aug 20 1996	Record filed.

Entry Date

Proceedings and Orders

Aug 23 1996

Record filed.

Sep 5 1996

Motion of petitioners and amici curiae California, et al. to permit California, et al. to participate in oral argument as amici curiae and for divided argument.

DENIED.

Sep 13 1996

CIRCULATED.

Nov 13 1996

ARGUED.

95-813

Supreme Court, U.S.

FILED

NOV 21 1995

CLERK

No. _____

In The
Supreme Court of the United States

October Term, 1995

BRAD BENNETT, et al.

Petitioners,

vs.

MARVIN PLENERT, et al.

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the citizen suit provision of the Endangered Species Act of 1973 (16 U.S.C. 1540(g)(1)) "any person" may commence a civil suit on his own behalf to enjoin the United States from violating the provisions of the Act or regulations issued thereunder. The questions presented are:

Whether the broad standing mandated by Congress in the citizen suit provision of the Endangered Species Act is subject to a zone of interest test as a further, judicially imposed prudential limitation on standing;

If standing to sue under the Endangered Species Act is subject to prudential limitations, whether those limitations permit only environmental plaintiffs to challenge government conduct alleged to violate the terms of the Act or whether the claims of economic injury raised by public water suppliers and water users are also within the zone of interests protected or regulated by the Act.

PARTIES

The petitioners are the Langell Valley Irrigation District and the Horsefly Irrigation District, each of which is organized as a political subdivision of the State of Oregon, and Brad Bennett and Mario Giordano, individuals resident in the State of Oregon.

The respondents are Marvin Plenert, the Regional Director, Region One of the United States Fish and Wildlife Service; John F. Turner, Director of the United States Fish and Wildlife Service; and Bruce Babbitt, Secretary of the United States Department of the Interior.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW.....	1
JURISDICTION.....	1
APPLICABLE FEDERAL LAWS	1
STATEMENT OF THE CASE.....	2
ARGUMENT	8
1. This Court Should Grant Review To Resolve A Conflict Among The Circuits And To Give Effect To Congress' Intent To Expand Standing To Sue Under the ESA	9
2. The Ninth Circuit's Decision Misapplies The Concept of Prudential Standing To Produce an Unwarranted Exclusion of Potential Plaintiffs Within the Zone of Interests Regulated By The ESA	16
3. The Ninth Circuit's Application of Prudential Standing Ignores Amendments to the ESA That Were Enacted to Expand the Range of Interests Protected by the Act.....	20
(a) Congress Amended the ESA to Require Consideration of Economic Feasibility and Community Impacts in the Development of Biological Opinions.....	20

TABLE OF CONTENTS - Continued

	Page
(b) Congress Explicitly Required a Balancing of Impacts as Part of the Designation of Critical Habitat	24
(c) Congress Explicitly Required Federal Agencies to Cooperate With State and Local Agencies to Resolve Water Resources Issues in Concert With the Conservation of Endangered Species	28
CONCLUSION	30

TABLE OF AUTHORITIES

	Page(s)
CASES:	
<i>Alvarez v. Longboy</i> , 697 F.2d 1333 (9th Cir. 1983)	15
<i>Association of Data Processing Service Organizations v. Camp</i> , 397 U.S. 150 (1973)	9, 10, 13, 15, 17
<i>Barlow v. Collins</i> , 397 U.S. 159 (1970)	9, 10, 17
<i>Boise Cascade Corp. v. U.S.E.P.A.</i> , 942 F.2d 1427 (9th Cir. 1991)	22
<i>Clarke v. Securities Industry Association</i> , 479 U.S. 388 (1987)	17, 18, 19
<i>Estate of Cowart v. Nicklos Drilling Co.</i> , 505 U.S. ____ 10 L.Ed.2d 379 (1992)	22
<i>Defenders of Wildlife v. Hodel</i> , 851 F.2d 1035 (8th Cir. 1990)	3, 11, 12, 13, 14
<i>Gladstone Realtors v. Village of Bellwood</i> , 441 U.S. 91 (1979)	10, 11, 13, 14
<i>Humane Soc. of the U.S. v. Hodel</i> , 840 F.2d 45 (D.C. Cir. 1988)	13
<i>Jeffers v. United States</i> , 432 U.S. 137 (1977)	29
<i>Lujan v. Defenders of Wildlife</i> , ____ U.S. ____ 119 L.Ed.2d 351 (1992)	3, 11, 14, 28
<i>National Audubon Society v. Hester</i> , 801 F.2d 405 (D.C. Cir. 1986)	13
<i>North Haven Bd. of Educ. v. Bell</i> , 456 U.S. 512 (1982)	23
<i>Overseas Educ. Ass'n Inc. v. FLRA</i> , 876 F.2d 960 (D.C. Cir. 1989)	23

TABLE OF AUTHORITIES - Continued

Page(s)

Pacific Northwest Generating Cooperative v. Brown,
38 F.3d 1058 (9th Cir. 1994).....6, 14

Pacific Northwest Generating Cooperative v. Brown,
Civ. Nos. 57-973, 92-1260 and 92-1264 (D.Or.
April 1, 1993) 6

Ratzlaf v. United States, 510 U.S.____, 126 L.Ed.2d
615 (1994)..... 22

S&M Inv. v. Tahoe Regional Planning Agency, 911
F.2d 324 (9th Cir. 1990), cert. den., 498 U.S. 1087
(1991)..... 22

Sierra Club v. Morton, 405 U.S. 727 (1972) 11

*State of Idaho By and Thru Idaho Public Utilities
Commission v. ICC*, 35 F.3d 585 (D.C. Cir. 1994) 13

Weinberger v. Rossi, 456 U.S. 25 (1982)..... 23

STATUTES:

5 U.S.C. § 701 4

5 U.S.C. § 702 19

16 U.S.C. § 1531..... 28

16 U.S.C. § 1532(13)2, 14

16 U.S.C. § 1533..... 24

16 U.S.C. § 1533(b)(2).....5, 6

16 U.S.C. § 1536.....4, 5

16 U.S.C. § 1536(b)(3)(A).....5, 21

16 U.S.C. § 1536(h)(1)(A)(i) 22

TABLE OF AUTHORITIES - Continued

Page(s)

16 U.S.C. § 1540(g)(1).....2, 4

16 U.S.C. § 1540(g)(2)(A)..... 4

16 U.S.C. § 1636 21

28 U.S.C. § 1254(a) 1

42 U.S.C. §§ 3601..... 10

REGULATIONS

50 C.F.R. § 402.02..... 24

OTHER

Federal Practice and Procedure; Jurisdiction 2d
§ 3531.7.....10, 19

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit (App. 1-18) is reported at 63 F.3d 915. The decision of the United States District Court (App. 19-30) is not reported.

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was filed and entered on August 24, 1995. While a Suggestion for Rehearing In Banc was filed on October 23, 1995,¹ no petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a).

APPLICABLE FEDERAL LAWS

Section 11(g)(1) of the Endangered Species Act states:

"Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf -

"(A) to enjoin any person, including the United States and any other governmental

¹ Petitioners initially attempted to file a Suggestion for Rehearing In Banc on October 6, 1995. Because of the need for extended argument regarding the exceptional importance of the issues raised and the apparent inconsistency of the decision herein with a series of prior Ninth Circuit decisions, petitioners requested the Court of Appeals' permission to extend the page limitation ordinarily applicable to a Suggestion for Rehearing In Banc. That request was denied. (App. 45) However, the Court did extend the time for filing a revised Suggestion for Rehearing and a shortened Suggestion was thereafter filed. To date, no ruling has issued from the Ninth Circuit regarding the Suggestion for Rehearing In Banc.

instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof." (81 Stat. 884, 16 U.S.C. § 1540(g)(1))

STATEMENT OF THE CASE

This case is appropriate for the granting of certiorari for two reasons. First, the Ninth Circuit Court of Appeals has rendered a decision regarding the applicability of prudential standing requirements to actions brought under the Endangered Species Act (16 U.S.C. §§ 1531 et seq.) which is in conflict with the decision of another United States court of appeals on the same matter. Specifically, the decision in this case conflicts with a decision of the Eighth Circuit. Second, this case raises an important issue of law concerning the scope of the interests protected or regulated by the Endangered Species Act ("ESA") which has not been, but should be, settled by this Court.

In its decision below, the Ninth Circuit Court of Appeals, per Judges Reinhardt, Pregerson and Canby, held that Congress' inclusion of a citizen suit provision in the ESA empowering "any person" to seek to enjoin a violation of the Act does not eliminate the need of also establishing prudential standing to bring such a suit. (App. 11) Because, in the Ninth Circuit's view, the overall purposes of the ESA are "singularly devoted to the goal of species protection," the economic and recreational interests asserted by two small irrigation districts and their water users lie outside the "zone of interest" protected by the Act. (Id. 12-13) In the Ninth Circuit, "only

plaintiffs who allege an interest in the preservation of endangered species" will have standing, in the future, to challenge government conduct alleged to violate the provisions of the ESA. (Id. 11)

As the Ninth Circuit recognized (App. 8, n.3), its ruling is contrary to the decision reached by the Eighth Circuit in *Defenders of Wildlife v. Hodel*, 851 F.2d 1035, 1039 (8th Cir. 1990), *opinion after remand*, 911 F.2d 117 (8th Cir. 1990), *rev'd on other grounds sub. nom.*, *Lujan v. Defenders of Wildlife*, ___ U.S. ___, 119 L.Ed.2d 351 (1992). There, the court held that Congress' enactment of the citizen suit provision found in the ESA abrogated the necessity of establishing prudential standing. (851 F.2d at 1039) Thus, according to the Eighth Circuit, a plaintiff commencing suit under the ESA need only meet the requirements for standing established by Article III of the Constitution. (Id.) When this Court granted certiorari in *Defenders of Wildlife*, it ultimately reversed the finding of the Eighth Circuit that the plaintiffs therein *met* the standing requirements imposed by Article III. (*Lujan v. Defenders of Wildlife*, *supra*, ___ U.S. ___, 119 L.Ed.2d 351, 365) At the same time, however, the Court did *not* alter the conclusions of the Eighth Circuit regarding prudential standing.

The issues presented by this petition arise in the context of litigation commenced in March, 1993 by two small irrigation districts, organized as political subdivisions of the State of Oregon, and two individual ranchers resident in Oregon, who receive their primary supply of irrigation water under Federal contract from reservoirs operated by the Bureau of Reclamation ("Bureau") in the eastern portion of the Klamath project, in Southern Oregon and Northern California. (App. 33-34)

Throughout most of the twentieth century, the Bureau utilized long-standing procedures for storing and releasing water from its Klamath project reservoirs which produced a reliable supply of water for irrigation purposes. In 1992, however, pursuant to a biological opinion developed by respondents with respect to two species of fish (the Lost River sucker and the shortnose sucker) listed as endangered under the ESA, it was determined that the Bureau's operational procedures for the reservoirs would be likely to jeopardize the continued existence of the two species. (Id. 37)

Accordingly, in purported compliance with the provisions of Section 7 of the ESA (16 U.S.C. § 1536), respondents developed a so-called "reasonable and prudent alternative" to the Bureau's proposal to maintain its long-standing operational procedures. The alternative requires reservoir levels to be maintained substantially higher during certain periods (App. 39), with the result that petitioners receive a correspondingly reduced supply of irrigation water, to their detriment. (Id. 40)

After complying with the necessary procedural prerequisites,² petitioners commenced litigation against respondents in the United States District Court for the District of Oregon under the citizen suit provision of the ESA (16 U.S.C. § 1540(g)(1)) and the provisions of the Administrative Procedure Act (5 U.S.C. §§ 701 et seq.) (App. 31-44) *Inter alia*, petitioners' Complaint alleged a

² By letter dated November 12, 1992, petitioners provided respondents with a 60-day Notice of Intent to Sue (16 U.S.C. § 1540(g)(2)(A)) (App. 33)

violation of Section 7 of the ESA (16 U.S.C. § 1536)³ resulting from respondents' imposition of restrictions on the withdrawal of irrigation water from the reservoirs on which petitioners rely. (App. 41) In addition, petitioners alleged that respondents' biological opinion effectively designated critical habitat for the two listed species without considering the economic effect of doing so, in violation of Section 4 of the ESA (16 U.S.C. § 1533(b)(2)).⁴

³ Section 7(b)(3)(A) of the Endangered Species Act provides:

"Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a) of this section, the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) of this section and can be taken by the Federal agency or applicant in implementing the agency action." (92 Stat. 3752, 16 U.S.C. § 1536(b)(3)(A))

⁴ Section 4(b)(2) of the Endangered Species Act provides:

"The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will

(App. 42) Based upon their claims, petitioners requested the trial court to compel respondents to withdraw their biological opinion and to declare respondents' actions to be in violation of both Sections 4 and 7 of the ESA. (App. 43-44)

Respondents moved to dismiss the complaint on the ground that petitioners lacked standing. (App. 20) In an unpublished order issued November 18, 1993, the District Court agreed that petitioners lacked prudential standing to sue under the ESA.⁵ (App. 25-29)

On appeal, the Ninth Circuit rejected the contention that the citizen suit language of Section 11(g) of the ESA abrogates the need to demonstrate prudential standing. (App. 11) Finding that such a contention, if accepted, would permit plaintiffs to sue even though their purposes were "plainly inconsistent with, or only 'marginally related' to, those of the Act . . ." the Ninth Circuit held:

"Only plaintiffs who allege an interest in the preservation of endangered species fall within the zone of interest protected by the ESA.

result in extinction of the species concerned." (92 Stat. 3764, 16 U.S.C. § 1533(b)(2))

⁵ The only authority cited by the District Court for its view was the trial court decision in *Pacific Northwest Generating Cooperative v. Brown*, Civ. Nos. 57-973, 92-1260 and 92-1264 (D.Or. April 1, 1993). (App. 27-28) Subsequent to issuance of the district court's opinion in the case at bench, the Ninth Circuit issued its decision on appeal in *Pacific Northwest Generating Cooperation v. Brown*, 38 F.3d 1058 (9th Cir. 1994). On the crucial issue of prudential standing, the Ninth Circuit – in 1994 at least – concluded that economic injury *could* be sufficient to satisfy the requirements of prudential standing, assuming those requirements even apply to actions commenced under the ESA. (38 F.3d 1058, 1065-66)

Because the plaintiffs have not alleged such an interest in their complaint, they do not have standing." (App. 11)

Finding the purposes of the ESA to be singularly aimed at species preservation, the Ninth Circuit also concluded that potential plaintiffs with economic or recreational claims could not satisfy the requisites of prudential standing:

"The overall purposes of the ESA are singularly devoted to the goal of ensuring species preservation; they do not embrace the economic and recreational interests that underlie the plaintiffs' challenge. (App. 12-13)

Indeed, the fact that petitioners sought to raise a competing interest in water from the affected reservoirs was enough, in the Ninth Circuit's view, to deprive them of standing to challenge the Government's determination of the amount of water necessary for the two protected species:

"In short, the plaintiffs do not seek to further the statutory purpose. Nor do they allege any community of interest of any kind between themselves and the suckers. To the contrary, they claim a competing interest – an interest in using the very water that the government believes is necessary for the preservation of the species." (App. 16)

The fact that Congress had specifically directed the Government to consider economic factors in making the kinds of determinations challenged by the petitioners did not cause the Ninth Circuit to alter its views on standing:

"Finally, we are aware that the ESA specifically provides that the government should consider a variety of factors – including economic ones – in designating critical habitat for a species. (See, 16

U.S.C. § 1533(b)(3)). The Act's inclusion of such directives does not alter our analysis. We do not believe that in setting forth the factors to be weighed in formulating a plan for protecting species, Congress intended to do more than ensure a rational decision-making process by providing guidance for government officials. Certainly, it did not intend impliedly to confer standing on every plaintiff who could conceivably claim that the failure to consider one of those factors adversely affected him. . . . To interpret the statute in the manner suggested by plaintiffs would be to transform provisions designed to further species protection into the means to frustrate that very goal. . . . Accordingly, we hold that the plaintiffs have no standing under the ESA." (App. 17, citations omitted.)

Thus, on August 24, 1995, the Ninth Circuit affirmed the Judgment of the District Court.

ARGUMENT

The Ninth Circuit Court of Appeals erred in holding that a zone of interest test applies to claims brought under the Endangered Species Act. Even if the petitioners would otherwise be barred by the rules of prudential standing, the decisions of this Court hold that Congress may expand standing to the full extent permitted by Article III of the Constitution. By authorizing "any person" to commence a civil action to enjoin the United States from violating the ESA, Congress did precisely that.

Moreover, the Ninth Circuit erred in applying the rules of prudential standing to bar all potential plaintiffs under the ESA save those "who allege an interest in the

preservation of endangered species." Not only does the circuit court's highly exclusionary decision ignore the limitations on prudential standing imposed by the decisions of this Court; it effectively disregards the efforts of Congress to expand the zone of interests cognizable under the ESA to encompass the precise claims raised by the petitioners in this case. By its decision, the Ninth Circuit has effectively closed the courts to the only potential plaintiffs who have a significant interest in assuring that the Government conducts the kind of balanced proceedings under the ESA which Congress intended.

1. This Court Should Grant Review To Resolve A Conflict Among The Circuits On the Same Matter And To Give Effect To Congress' Intent To Expand Standing To Sue Under the ESA

The zone of interest test was first articulated in the companion decisions in *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970) and *Barlow v. Collins* 397 U.S. 159 (1970), both of which involved the reach of Section 10 of the Administrative Procedure Act (5 U.S.C. § 702). Writing for the Court in both cases, Justice Douglas cast the zone of interest test as a rule of judicial self-restraint (397 U.S. at 154), not as a rule having constitutional dimension. Moreover, he recognized that Congress could, if it so elected, expand the limits of standing to the boundaries imposed only by Article III of the Constitution:

"The question of standing is different. It concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complaint is arguably within the zone of interest to be protected or regulated

by the statute or constitutional guarantee in question.

"Apart from Article III jurisdictional questions, problems of standing, as resolved by this Court have involved a 'rule of self-restraint.' Congress can, of course, resolve the question one way or another, save as the requirements of Article III dictate otherwise." (397 U.S. at 153-54, citations omitted)

Commenting upon *Data Processing* and *Barlow*, one leading treatise observes:

"The zone of interest requirement was apparently treated in the *Data Processing* opinion as a matter of judicial self-restraint. Against the values of restraint, the Court set the perception that Congress had intended § 10 of the Administrative Procedure Act to enlarge the class of people who can challenge administrative action. As the opinion left matters, it could have been possible to find that the zone of interest requirement is an important part of the standing doctrine, to be weighed heavily, *unless Congress has acted to encourage review*. It would also have been possible to conclude that little need be shown to satisfy the requirement." (Wright, Miller and Cooper, *Federal Practice and Procedure*; Jurisdiction 2d § 3531.7 emphasis added)

Nearly a decade later, the Court elaborated upon its earlier statement that Congress could, by legislation, resolve the prudential standing issue. In *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979) – which is cited by the Ninth Circuit, but never applied to the circumstances presented in the present case (App. 17-18) – the Court considered language in the Fair Housing Act of 1968 (42 U.S.C. §§ 3601 *et seq.*) which authorized any

"person aggrieved" to commence a civil action to enforce the rights granted by the Act. Concluding that Congress had intended to grant standing "as broad as is permitted by Article III of the Constitution" (441 U.S. at 109) the Court stated:

"Congress may, by legislation, expand standing to the full extent permitted by Article III, thus permitting litigation by one 'who otherwise would be barred by prudential standing rules.' In no event, however, may Congress abrogate the Article III minima: A plaintiff must always have suffered 'a distinct and palpable injury to himself,' that is likely to be redressed if the requested relief is granted." (441 U.S. at 100, citations omitted)

Subsequently, in *Defenders of Wildlife v. Hodel*, *supra*, 851 F.2d 1035, *opinion after remand*, 911 F.2d 117, *rev'd on other grounds sub. nom. Lujan v. Defenders of Wildlife*, *supra*, ___ U.S. ___, 119 L.Ed.2d 351, the Eighth Circuit concluded that Congress had undertaken precisely such an abrogation of prudential standing with respect to litigation commenced under the provisions of the ESA:

"Unlike the constitutional limitations [on standing], Congress may eliminate the prudential limitations by legislation. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 at 100, 99 S.Ct. at 1608. Where 'Congress has authorized public officials to perform certain functions according to law, and has provided by statute for judicial review of those actions under certain circumstances, the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff.' *Sierra Club v. Morton*, 405 U.S. 727, 732, 92 S.Ct. 1361, 1364-65, 31 L.Ed.2d 636 (1972). In this case, the ESA provides that 'any person'

may commence a suit to enjoin any person who is alleged to be in violation of the ESA. See 16 U.S.C. § 1540(g). Environmental associations are 'persons' and may bring suit in their own name. *Id.* at 1532(13). Defenders therefore need meet only the constitutional requirements for standing for their claims under the ESA." (851 F.2d at 1039)

In the course of reviewing the Eighth Circuit's decision in *Defenders of Wildlife, supra*, this Court considered the question of standing to sue under the ESA at length. (*Lujan v. Defenders of Wildlife, supra*, ___ U.S. ___, 119 L.Ed.2d 351 (1992)). While the Court reversed the Eighth Circuit's conclusion that the plaintiffs had met the standing requirements imposed by Article III of the Constitution, it left intact the circuit court's conclusion regarding congressional abrogation of prudential standing through the enactment of Section 11(g) of the ESA. Indeed, when the Court discussed prudential standing at all, it was in terms which emphasized judicial self-government rather than the concept of a barrier to otherwise qualified potential plaintiffs:

"One of those landmarks, setting apart the 'cases' and 'controversies that are of the justiciable sort referred to in Article III - 'serving to identify those disputes which are appropriately resolved through the judicial process' - is the doctrine of standing. Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case - or controversy requirement of Article III." (___ U.S. ___, 119 L.Ed.2d at 364, citations omitted)

The Ninth Circuit's decision effectively ignores the consistently expressed view of this Court, that Congress

may expand standing under a statute to the limits of Article III of the Constitution. Although it cites *Gladstone Realtors* to that effect (App. 8) it never applies *Gladstone* - or *Data Processing* or any other decision of this Court - to the citizen suit language actually adopted by Congress in the ESA. Likewise, although the Ninth Circuit acknowledges a conflict between its decision and the Eighth Circuit's decision in *Defenders of Wildlife, supra*, (App. 8, n.3) it never offers to explain why, in its view, the Eighth Circuit's decision is incorrect.⁶

The foregoing omissions are crucial in view of the citizen suit language enacted by Congress as part of the ESA. By authorizing "any person" to sue to enjoin a violation of the ESA, Congress chose language even

⁶ The Ninth Circuit's decision also points out that the split of authority among the circuit courts of appeal includes the Circuit Court of Appeals for the District of Columbia (App. 8) which has ruled, in three cases, that Congress' decision to incorporate citizen suit language into the ESA did not abrogate the obligation of a plaintiff to demonstrate prudential standing. (See *State of Idaho By and Thru Idaho Public Utilities Commission v. ICC*, 35 F.3d 585, 592 (D.C. Cir. 1994); *Humane Soc. of the U.S. v. Hodel*, 840 F.2d 45 (D.C. Cir. 1988); *National Audubon Society v. Hester*, 801 F.2d 405, 407 (D.C. Cir. 1986)

It is noteworthy, however, that none of the D.C. Circuit's opinions on the issue - unlike the Eighth Circuit's opinion in *Defenders of Wildlife, supra* - was the subject of a hearing by this Court. Nor has the D.C. Circuit attempted to use prudential standing to bar everyone except environmental plaintiffs from the ability to sue under the ESA. To the contrary it has found, for example, that a state's proprietary interest in land satisfies the test without regard to whether the state has an interest in the preservation of endangered species. (*State of Idaho, supra*) Indeed, the D.C. Circuit appears to have never applied prudential standing to exclude any class of plaintiffs from an ESA suit, let alone all classes of potential plaintiffs, save one.

broadier than that used in *Gladstone Realtors*. Indeed, it used the broadest language possible.⁷

In these circumstances, the Ninth Circuit's assertion that its decision is justified because it has applied prudential standing obligations in the face of other citizen suit provisions (App. 7, 9) is largely irrelevant. Moreover, the assertion is a considerable overstatement. For example, in *Pacific Northwest Generating Cooperative v. Brown*, *supra*, 38 F.3d 1058 – cited by the Ninth Circuit as support for its application of prudential standing in the present case (App. 7) – the Court, in fact, *declined* to resolve the issue of whether the ESA's citizen suit provision abrogates the requirements of prudential standing. Instead, it *assumed* the applicability of those requirements and concluded that the *economic* interest of power users reliant upon the federal Bonneville project was enough to satisfy the test:

"It is an open question whether the plaintiffs must satisfy the prudential 'zone of interest' test in addition to Article III standing requirements. A sister circuit has dispensed with this requirement. *Defenders of Wildlife v. Hodel*, 851 F.2d 1035, 1039 (8th Cir. 1988), *opinion after remand*, 911 F.2d 117 (8th Cir. 1990), *rev'd on other grounds sub. nom. Lujan v. Defenders of Wildlife*, 122 S.Ct. 2130, 119 L.Ed.2d 351 (1992). We, however, will assume that the requirement must be met. For

⁷ "Person" is defined in Section 3 of the ESA (16 U.S.C. § 1532(13)) as follows:

"The term 'person' means an individual, corporation, partnership, trust, association, or any other private entity, or any officer, employee, agent, department or instrumentality of the Federal government, of any State or political subdivision thereof, or any foreign government."

reasons now to be stated, we conclude that it has been met.

The present endangered or threatened status of the species imposes actual costs upon the plaintiffs. They have a real economic interest in changing the status. We see no reason why that economic interest is not convertible into a legal interest. Once that legal interest is recognized, the plaintiffs qualify for standing under footnote seven." (38 F.3d 1058 at 1065-66)

Similarly, in *Alvarez v. Longboy*, 697 F.2d 1333 (9th Cir. 1983) also cited by the Ninth Circuit as support for its decision in the present case (App. 10), the Court construed a provision in the Farm Labor Contractor Registration Act that permitted "any person aggrieved" to bring suit. (697 F.2d at 1336) Analyzing the requirements imposed by the zone of interest test in this context, the Ninth Circuit stated:

"This language is patterned after language defining standing under the Federal Civil Rights statutes, and . . . show[s] a congressional intention to define standing as broadly as is permitted by Article III of the Constitution." (697 F.2d at 1336)

In sum, as the Ninth Circuit recognized in *Alvarez*, and as this Court has recognized in *Data Processing* and *Gladstone*, the constitutionally imposed standing requirements of Article III will continue to apply to *all* potential plaintiffs under the ESA. Those requirements are enough to ensure that, in the future, real plaintiffs will bring real cases and controversies to the courts. At the same time, given Congress' manifest intention, expressed through Section 11(g) of the ESA, to expand standing under the Act to the limits of Article III, there is simply no basis to

exclude all potential plaintiffs, save one apparently favored group, through the inappropriate application of a zone of interest test.

2. The Ninth Circuit's Decision Misapplies The Concept of Prudential Standing To Exclude Potential Plaintiffs Who Are Within the Zone of Interest Regulated By The ESA

The result of the Ninth Circuit's decision in the present case is to exclude from federal court all potential plaintiffs under the ESA unless they allege an interest in the preservation of endangered species. (App. 11) If a potential plaintiff is unlucky enough to be dependent upon a federal project which makes use of a resource determined by federal wildlife officials to be necessary for an endangered species, the Ninth Circuit's decision bars the plaintiff from challenging any determination regarding disposition of the resource, even if the disposition is incompatible with the requirements of the law. It reaches this result because the potential plaintiff, in the Ninth Circuit's view, is claiming a "competing interest" in the resource and is thus outside the zone of interest protected by the ESA. (App. 16) Indeed, even if the potential plaintiff asserts an economic interest expressly recognized in the Act, he remains outside of the zone of interest, according to the Ninth Circuit, since his assertion of economic claims "would be to transform provisions designed to further species protection into the means to frustrate that very goal." (App. 17) Petitioners respectfully suggest that this remarkable application of prudential standing lies well beyond the bounds of this Court's standing decisions.

When this Court initially articulated the concept of prudential standing, it did so in terms which recognized not only a zone of interest "protected" by the statute in question, but also a zone of interest "regulated" by the relevant statute:

"The question of standing is different. It concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complaint is arguably within the zone of interest to be protected *or regulated* by the statute or constitutional guarantee in question." (*Association of Data Processing Service Organization v. Camp*, *supra*, 397 U.S. 150 at 153, emphasis added)

By focusing exclusively on the purported zone of interest "protected" by the ESA and ignoring the zone of interest *regulated* under the ESA, the Ninth Circuit has managed to truncate the prudential standing test in a manner incompatible with the very decision which established the test. Because they receive their primary source of irrigation water from the federal reservoirs effectively regulated by the biological opinion adopted by respondents, the petitioners are without doubt, "arguably within the zone of interest . . . regulated by the statute . . . in question."

Almost two decades after first articulating a prudential standing test, this Court elaborated upon the limitations inherent in any effort to apply the test. In *Clarke v. Securities Industry Association*, 479 U.S. 388 (1987), the Court considered a challenge brought by an association of securities dealers utilizing Section 10 of the Administrative Procedure Act (the same statute utilized in *Data Processing* and *Barlow*) to challenge a ruling by the Comptroller of the Currency that permitted national banks to

conduct discount brokerage operations from locations where branch banking would be prohibited. According to the Ninth Circuit, prior to *Clarke*, the zone of interest test "... appeared to be on the verge of being abandoned." (App. 5)

While the Ninth Circuit believes *Clarke* "resuscitated" prudential standing and cites the decision for the proposition that a zone of interest test applies even in cases which are not brought under the Administrative Procedure Act (App. 5-6), it never actually manages to refer to the main text of the Court's opinion in the case. Thus, the Ninth Circuit's decision ignores the following discussion appearing in the majority opinion in *Clarke*:

"The 'zone of interest' test is a guide for deciding whether, in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision. In cases where the plaintiff is not itself the subject of the regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot be reasonably assumed that Congress intended to permit the suit. *The test is not meant to be especially demanding.*" (479 U.S. at 399, emphasis added)

Thus, according to this Court, there need only be a "plausible relationship" between the interests of the litigants and the policies embedded in the overall context of the statute at issue. (479 U.S. at 403) Moreover, as this Court explained:

"The principal cases in which the 'zone of interest' test has been applied are those involving claims under the APA, and the test is most

usefully understood as a gloss on the meaning of § 702." (479 U.S. at 400, n.16)

This analysis by the *Clarke* majority led one respected commentator to a view fundamentally different than that expressed by the Ninth Circuit regarding the "resuscitation" of the zone of interest test and its applicability beyond actions brought pursuant to the APA:

"This opinion [*Clarke*] puts the zone of interest test once again in eclipse. The most obvious reading would be to limit the test to administrative review proceedings under § 10 of the APA, and to apply it to permit standing unless there are special reasons to fear that a particular plaintiff will impair the objectives embedded in the underlying regulatory statute. The presumption of reviewability is likely to be difficult to overcome. Beyond this point, only the brave would venture to illuminate the obscure hint that other settings will support different prudential tests that somehow resemble the zone of interest test." (Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* 2d § 3531.7 (1995 Supplement))

In short, the decision of the Ninth Circuit in the present case turns the zone of interest test on its head. Rather than a test not meant to be "especially demanding," it is now a test which can be wielded, in the Ninth Circuit, to exclude potential plaintiffs virtually at will. From a test understood to be a "gloss" on the meaning of Section 702 of the APA, the test will now be employed, within the Ninth Circuit, to close the courts to plaintiffs whether they bring suit under the APA or not. From a test thought to be "in eclipse," the zone of interest test now emerges, within the Ninth Circuit, as a highly discriminatory tool to be used to bar entire groups of potential

plaintiffs from court even if they are within the zone of interest "regulated" by the statute in question. This result, petitioners respectfully submit, is beyond the bounds of any reasonable interpretation of the prior decisions of this Court.

3. The Ninth Circuit's Application of Prudential Standing Ignores Amendments to the ESA That Were Enacted to Expand the Range of Interests Protected by the Act

If a prudential standing test nonetheless applies to actions brought under the ESA, it is evident that the Ninth Circuit has construed the applicable zone of interest too narrowly. As the basis for its conclusion that petitioners fail to satisfy the requirements of prudential standing, the Ninth Circuit stated:

"The overall purposes of the ESA are singularly devoted to the goal of ensuring species preservation; they do not embrace the economic and recreational interests that underlie the plaintiffs' challenge." (App. 12-13)

This view of the ESA is at odds with at least three different amendments adopted by Congress for the purpose of expanding the range of interests cognizable under the Act. Each of these amendments is directly related to the claims raised by the petitioners in this proceeding.

(a) Congress Amended the ESA to Require Consideration of Economic Feasibility and Community Impacts in the Development of Biological Opinions

In 1978, Congress amended the ESA by enacting the consultation procedures which resulted in the biological opinion at issue in this case. Its purpose in doing so was

to introduce flexibility into the Act. (See e.g., H.R. Rep. No 1625, 95th Cong., 2nd Sess., at 3 (1978); 124 Cong. Rec. 9804 (1978) (Statement of Sen. Baker); 124 Cong. Rec. 21,135 (1978) (Statement of Sen. Randolph); 124 Cong. Rec. 21,139 (1978) (Statement of Sen. Scott)). Congress achieved its purpose by charting a path which incorporates a balancing of economic impacts into the consultation procedure. (124 Cong. Rec. 38,132 (1978) (Statement of Rep. Murphy); 124 Cong. Rec. 38,138 (1978) (Statement of Rep. Burgener); 124 Cong. Rec. 9,804 (1978) (Statement of Sen. Baker); 124 Cong. Rec. 9,805 (1978) (Statement of Sen. Wallop)).

The specific vehicle which Congress chose for this purpose was a comprehensive amendment of Section 7 of the ESA. (16 U.S.C. § 1636) It is under this section, as amended, that petitioners brought one of their two ESA-based claims in this case. (App. 41) Included as part of the amendment of Section 7 was a requirement that "reasonable and prudent alternatives" be developed by the Secretary in the event a project, as proposed, is found to cause jeopardy to a listed species. (16 U.S.C. § 1536(b)(3)(A)).⁸ The language chosen - "reasonable and

⁸ Section 7(b)(3)(A) of the Act (16 U.S.C. § 1536(b)(3)(A)) provides:

"Promptly after conclusion of consultation under paragraphs (2) or (3) of subsection (a) of this section, the Secretary shall provide to the Federal Agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. *If jeopardy or adverse modification of critical habitat is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not*

prudent alternatives" – is word-for-word identical to language chosen by the *same* Congress, at the *same* time and used in the *same* section of the amended Act, to describe a key finding required of a so-called "Endangered Species Committee" in order for it to grant an exemption from the jeopardy requirements of the Act. (16 U.S.C. § 1536(h)(1)(A)(i))

It is well recognized, of course, that terms should be construed consistently throughout the same statute. (*Ratzlaf v. United States*, 510 U.S. ___, 126 L.Ed.2d 615, 623 (1994); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. ___, 120 L.Ed.2d 379 (1992)) Indeed, in other cases, the Ninth Circuit itself has recognized that when the *same* word or phrase is used in different parts of the same statute, the courts will presume that the word or phrase has the same meaning throughout. (*S&M Inv. v. Tahoe Regional Planning Agency*, 911 F.2d 324, 328 (9th Cir. 1990), *cert. den.*, 111 S.Ct. 963 (1991); *Boise Cascade Corp. v. U.S.E.P.A.*, 942 F.2d 1427, 1432 (9th Cir. 1991))

Reference to the legislative history of the 1978 amendments of the ESA discloses that the phrase "reasonable and prudent alternatives" was defined in detail during debate on S. 2899, 95th Cong., 2nd Sess. (1978), which contained the amendatory language ultimately adopted by Congress. During a colloquy concerning the meaning of the phrase "reasonable and prudent alternatives," Senator Howard Baker – without dissent – stated the following:

violate subsection (a)(2) of this section and can be taken by the Federal Agency or applicant in implementing the agency action." (Emphasis added)

"It is the intent of the Environment and Public Works Committee that the cabinet-level panel established by S. 2899 [the Endangered Species Committee] in evaluating alternatives examine not only engineering 'feasibility,' but also environmental and *community impacts, economic feasibility and other relevant factors*. In other words, the Environment and Public Works Committee believes that the use of the term 'reasonable' rather than 'feasible' gives more flexibility to the Endangered Species Committee in its review of 'irresolvable' conflicts arising under the Endangered Species Act." (124 Cong. Rec. 21,590 (1978)).

Senator Baker's position as one of the chief sponsors of the so-called "Culver-Baker Amendments" which comprised S. 2899, is important. As expressed in *Overseas Educ. Ass'n, Inc. v. FLRA*, 876 F.2d 960 (D.C. Cir. 1989):

" . . . [N]o one can gainsay the overwhelming judicial support for the proposition that explanations by sponsors of legislation during floor discussion are entitled to great weight when they cast light on the construction properly to be placed upon statutory language. This principle is firmly embedded in the jurisprudence of the Supreme Court, e.g., *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-527 (1982) ('remarks of the sponsor of language ultimately enacted are an authoritative guide to the statute's construction'); *Weinberger v. Rossi*, 456 U.S. 25, 35 (1982) (Sponsor's statements entitled to weight)" (876 F.2d at 967, n.41)

Of at least equal significance is the fact that respondents, themselves, have interpreted the ESA to require that the "reasonable and prudent alternatives" which lie at the heart of any biological opinion which makes a jeopardy finding, must be "economically feasible." In

Joint Regulations adopted by the United States Fish and Wildlife Service and the Marine Fisheries Service for the purpose of administering the ESA, the agencies define "reasonable and prudent alternatives" as follows:

"Reasonable and prudent alternatives refer to alternative actions during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistently with the scope of the federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat." (50 CFR § 402.02, emphasis added)

In short, both Congress and the agencies charged with implementation of the ESA recognized that development of the kind of "reasonable and prudent alternative" which lies at the heart of the present case must be guided by the concept of "economic feasibility." The Ninth Circuit's decision in this case, however, denies standing to the only group of potential plaintiffs with a substantial interest in ensuring compliance with the "economic feasibility" requirement.

(b) Congress Explicitly Required a Balancing of Impacts as Part of the Designation of Critical Habitat

When Congress amended the ESA in 1978, it also modified Section 4 (16 U.S.C. § 1533) to add a new paragraph which obligates the Secretary to weigh and balance the benefits and burdens of including particular areas

within designated critical habitat.⁹ According to the House Report which accompanied the bill (H.R. 14104, 95th Cong., 2nd Sess. (1978)) that added the balancing language, the proposal represented a compromise between disparate points of view: it attempted to retain the basic integrity of the ESA while introducing some flexibility which would permit exemptions from the Act's requirements. (H.R. Rep. No. 1625, 95th Cong., 2nd Sess., (1978), reprinted in 1978 U.S.C.C.A.N. 9453, 9463-64)).

During the debates in the House leading to adoption of the bill, Representative Leggett, the bill's author, described the purpose of the balancing requirement. He stated:

"The Endangered Species Act has been criticized because it allows for no consideration of the economic impact of listing a species or designating critical habitat. Although H.R. 14104 retains the Act's stringent mandate, it does introduce a consideration of economic impact in several respects. . . . [T]he bill includes a provision which requires the Secretary to evaluate the

⁹ The language adopted by Congress in 1978 added the following paragraph to Section 4(b) of the ESA:

"In determining the critical habitat of any endangered or threatened species, the Secretary shall consider the economic impact, and any other relevant impacts, of specifying any particular area as critical habitat, and he may exclude any such area from the critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species. (Act of Nov. 10, 1978, Pub. L. No. 95-632, 1978 U.S.C.C.A.N. (92 Stat.) 366).

economic impact of designating critical habitat for invertebrate species. This provision authorizes the Secretary to alter the designation of critical habitat for the species if he determines that the benefits associated with excluding the habitat outweigh the benefits associated with the designation. . . . " (124 Cong. Rec. 38,134 (1978) (Statement of Rep. Leggett)).

In 1982 when Congress later reauthorized and amended the ESA (P.L. 97-304) the House Report which accompanied the amendments stated the following regarding the balancing obligation in Section 4:

"Desirous to restrict the Secretary's decision on species listing to biology alone, the [Merchant Marine and Fisheries] Committee nonetheless recognized that the critical habitat designation, with its attendant economic analysis, offers some counter-point to the listing of species without due consideration for the effects on land use and other development interests." (H.R. 567, 97th Cong., 2nd Sess. (1982), reprinted in 1982 U.S.C.C.A.N. 2807, 2812 (Merchant Marine and Fisheries Committee)).

Congress thus amended the ESA for the explicit purpose of broadening its focus to accommodate economic-based interests in connection with the designation of critical habitat. Precisely such interests were raised in the complaint filed by appellants herein. With considerable clarity they alleged a designation by the Secretary of critical habitat without *any* consideration of economic impacts, in violation of the ESA. (App. 42)

Despite petitioners' efforts to invoke the economic balancing requirement amended into the ESA by Congress, however, the Ninth Circuit was unmoved:

"[W]e are aware that the ESA specifically provides that the government should consider a

variety of factors - including economic ones - in designating critical habitat for a species. (See, 16 U.S.C. § 1533(b)(3)). The Act's inclusion of such directives does not alter our analysis. We do not believe that in setting forth the factors to be weighed in formulating a plan for protecting species, Congress intended to do more than ensure a rational decision-making process by providing guidance for government officials. Certainly, it did not intend impliedly to confer standing on every plaintiff who could conceivably claim that the failure to consider one of those factors adversely affected him." (App. 17).

The Ninth Circuit's conclusions are inconsistent with the statements of both the author of the bill which added the economic balancing requirement to the ESA and the House Committee with jurisdiction over the Act. Of equal concern, the Ninth Circuit's decision denies standing to the only potential plaintiffs possessing a substantial interest in assuring that the habitat designation process in fact is rational in its consideration of economic factors. The absence of any consideration of economic impacts is at the heart of the petitioners' remaining claim for relief under the ESA. (App. 42)

In this regard, it is unrealistic to expect, as the Ninth Circuit apparently does that, in future, the cudgels of litigation will be picked up by a *regulated* federal agency and used against a federal *regulating* agency:

"None of the plaintiffs is directly subject to the regulatory action. Rather, it is the Bureau of Reclamation which would be required to act if any rules regarding reservoir water levels are ultimately adopted. We do not consider here when a directly regulated entity, or a party standing in the shoes of such an entity, would have standing." (Slip Opinion, p. 10654, n.2)

While the specter of one agency of the Department of Interior suing a sister agency of the same Department may be interesting to contemplate in a theoretical sense, the dearth of such cases suggests that the likelihood of sister agency litigation in the real world is not high. Moreover, it is unclear how potentially collusive litigation brought by sister agencies answerable to the same cabinet official furthers the goal of the standing doctrine; viz, identifying those justiciable "cases" or "controversies" which are "appropriately resolved through the judicial process. . . ." (*Lujan v. Defenders of Wildlife, supra*, ___ U.S. ___, 119 L.Ed.2d at 364) As has been true for a considerable period of time, in the Ninth Circuit and elsewhere, those who rely on federal projects – not the federal operator of the project – are more likely to present a real "case" or "controversy" regarding federal regulatory action. This is so since the operator of the project effectively serves as a middleman, while the users of the water, who rely upon the project for inputs critical to their homes, farms or businesses are, in fact, the parties who possess the "interest" which is regulated.

(c) Congress Explicitly Required Federal Agencies to Cooperate With State and Local Agencies to Resolve Water Resources Issues in Concert With the Conservation of Endangered Species

Finally, the Ninth Circuit asserts that its analysis of the applicable zone of interest is borne out by Section 2 of the ESA (16 U.S.C. § 1531) which sets forth the Act's

purposes. (App. 13-14) Thus, in quoting Section 2(b),¹⁰ the Court declares:

"That section provides no basis for concluding that the plaintiffs' interest in obtaining water that the government deems critical to the survival of endangered fish is a protected one." (App. 13-14)

Unfortunately, the Ninth Circuit neglected to examine the very next subsection of the ESA which sets forth Congress' policy regarding the protection of endangered species and provides the following, in relevant part:

"(2) It is further declared to be the policy of Congress that federal agencies shall cooperate with state and local agencies to resolve water resource issues in concert^[11] with conservation of endangered species."

With respect to the singular matter of "water resource issues", it is thus evident that Congress granted state and local water resource agencies an interest in obtaining federal cooperation in resolving endangered

¹⁰ Section 2(b) of the ESA provides:

"The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved, to provide a program for the conservation of such endangered and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section."

¹¹ In *Jeffers v. United States*, 432 U.S. 137, 148-49 (1977), this Court defined the words "in concert" in the following terms:

"In the absence of any indication from the legislative history or elsewhere to the contrary, the . . . likely explanation is that Congress intended the word 'concert' to have its common meaning of agreement in a design or plan."

species conservation issues agreeably with water resource management concerns. Such agencies – and appellants Horsefly Irrigation District and Langell Valley Irrigation District are each alleged to be a subdivision of the State of Oregon – have a unique interest that is protectable under the terms of the ESA itself. That interest was completely ignored by the Ninth Circuit which found, instead, that the ESA has a “singular” goal of ensuring species preservation. Simply put, the finding is incompatible with the policy language of the ESA itself.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

DATED: November 21, 1995

Respectfully submitted,

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APPENDIX

Brad BENNETT; Mario Giordano; Langell Valley Irrigation District, a political subdivision of the state of Oregon; Horsefly Irrigation District, a political subdivision of the State of Oregon, Plaintiffs-Appellants,

v.

Marvin L. PLENERT, in his official capacity as Regional Director, Region One, Fish and Wildlife Service, U.S. Department of the Interior; John F. Turner, in his official capacity as Director, Fish and Wildlife Service, U.S. Department of the Interior; Bruce Babbitt, in his official capacity as Secretary, U.S. Department of the Interior, Defendants-Appellees.

No. 94-35008.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted June 7, 1995.

Decided Aug. 24, 1995.

William F. Schroeder, Schroeder, Hutchens & Sullivan, Vale, OR, for plaintiffs-appellants.

Ellen J. Durkee, U.S. Dept. of Justice, Washington, DC, for defendants-appellees.

Appeal from the United States District Court for the District of Oregon.

Before: PREGERSON*, CANBY, and REINHARDT,
Circuit Judges.

REINHARDT, Circuit Judge:

This case requires us to determine whether plaintiffs who assert no interest in preserving endangered species may sue the government for violating the procedures established in the Endangered Species Act. We conclude that they may not.

I.

The plaintiffs are two Oregon ranch operators and two irrigation districts located in that state. They challenge the government's preparation of a biological opinion which concludes that the water level in two reservoirs should be maintained at a particular minimum level in order to preserve two species of fish. The plaintiffs, who make use of the reservoir water for commercial (and recreational) purposes, bring this action under the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.*, the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.*, and the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C).

*Judge Tang was originally a member of this panel and heard argument in this case. Judge Tang died prior to circulation of this opinion, and pursuant to General Order 3.2(g), Judge Pregerson was drawn as a replacement. Judge Pregerson was furnished with a tape of the oral argument as well as the briefs and other materials received by the other members of the panel.

The two reservoirs in question are part of the federal government's Klamath Project, which the Bureau of Reclamation administers. The Bureau concluded that the long term operation of the Klamath Project might adversely affect two species of fish: the Lost River and shortnose suckers. Pursuant to the requirements of the ESA, the Bureau consulted with the United States Fish and Wildlife Service in order to assess the impact of the Klamath Project on the fish. 16 U.S.C. § 1536(a)(2).

As a result of the consultation, the Service prepared a biological opinion. 16 U.S.C. § 1536(b)(3)(A). The opinion concluded that unless mitigating actions were taken the "long-term operation of the Klamath Project was likely to jeopardize the continued existence of the Lost River and shortnose suckers." The opinion "recommended a number of measures the [Bureau] could take to avoid jeopardy to the suckers . . . including the recommendations regarding maintaining minimum lake level at issue in this case." The Bureau informed the Service that it accepted the opinion's recommendations and intended to comply with them.

The plaintiffs filed suit for declaratory and injunctive relief in an effort to compel the government to withdraw portions of the biological opinion. Their complaint alleges that there is no evidence to support the opinion's conclusion that the long-term operation of the Klamath project will adversely affect suckers. In fact, the complaint alleges that the evidence shows that the fish are "reproducing successfully" and are not in need of special protection. The complaint then explains that the plaintiffs' objective in seeking to prevent the government from raising the minimum reservoir levels is to ensure that more

water will be available for their own commercial (and recreational) use. In short, they wish to use for their own purposes some of the water that the government maintains is needed to ensure the survival of the suckers.

The complaint alleges that in preparing the opinion, the government violated the consultation provisions set forth in 16 U.S.C. § 1536(a) of the ESA. It also alleges that the government violated 16 U.S.C. § 1533(b)(2) of the ESA by failing to consider the economic impact of its determination that the reservoirs constituted critical habitats for the suckers. They bring related claims pursuant to the APA and NEPA.

The government moved to dismiss the complaint for lack of standing. The district court concluded that the plaintiffs' interest in utilizing the Klamath water for commercial and recreational purposes "conflict[s] with the Lost River and shortnose suckers' interest in using water for habitat." Accordingly, it concluded that the plaintiffs lacked standing because their claims were premised on "an interest which conflicts with the interests sought to be protected by the Act."

II.

The issue before us is not whether the plaintiffs have satisfied the constitutional standing requirements but whether their action is precluded by the zone of interests

test, the prudential standing limitation that the district court deemed dispositive.¹

The zone of interests test first appeared as a standing requirement in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 829-30, 25 L.Ed.2d 184 (1970). There, the Court held that a plaintiff seeking judicial review under the Administrative Procedure Act (APA) must show that "the interest sought to be protected by [him was] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 153, 90 S.Ct. at 830. In the decade that followed, the test appeared to be on the verge of being abandoned. However, in 1987, the Court resuscitated it, offering an "exegesis" regarding when the test applies and how a court should determine whether it has been met. *See Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 410, 107 S.Ct. 750, 762-63, 93 L.Ed.2d 757 (1987) (Stevens, J. concurring in part).

¹ We note that the zone of interests test applies even to plaintiffs who have established constitutional standing premised on a procedural injury. *See Douglas County v. Babbitt*, 48 F.3d 1495, 1500-1501 (9th Cir.1995) (applying the prudential zone of interests test after concluding that the plaintiffs had procedural standing to assert a claim) (citations omitted); *Yesler Terrace Community Council v. Cisneros*, 37 F.3d 442, 447 (9th Cir.1994) (same). Accordingly, we need not address whether the plaintiffs have procedural, or as it is sometimes known, "footnote seven" standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570-573 n. 7, 112 S.Ct. 2130, 2142-2143 n. 7, 119 L.Ed.2d 351 (1992). *See also Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918, 921 n. 2 (D.C.Cir.1989) (explaining that standing may be decided on prudential grounds without first undertaking the constitutional inquiry).

In a lengthy footnote, the *Clarke* Court made it clear that some form of the zone test applies even in cases which are not brought under the Administrative Procedure Act. However, it cautioned that “[w]hile inquiries into reviewability or prudential standing in other contexts may bear some resemblance to a ‘zone of interest’ inquiry under the APA, it is not a test of universal application.” *Clarke*, 479 U.S. at 400 n. 16, 107 S.Ct. at 757 n. 16. Perhaps because the Court did not proceed to explain how the test might differ when applied to non-APA actions, our court, like most others, has continued to apply the traditional zone of interests test to such actions, as well as to APA cases. See, e.g., *Central Arizona Water Conservation District v. EPA*, 990 F.2d 1531, 1538-39 (9th Cir.), cert. denied, ___ U.S. ___, 114 S.Ct. 94, 126 L.Ed.2d 61 (1993) (*Clean Air Act*); *Self-Insurance Institute v. Koriath*, 993 F.2d 479, 484 (5th Cir.1993) (preemption); *ANR Pipeline v. Corporation Commission of State of Oklahoma*, 860 F.2d 1571, 1579 (10th Cir.1988), cert. denied, 490 U.S. 1051, 109 S.Ct. 1967, 104 L.Ed.2d 435 (1989) (same); 13 Wright, Miller & Cooper, Federal Practice and Procedure § 3531.7 (Supp.1993). We follow that practice here.

Clarke’s principal relevance to the case before us is its holding regarding when a plaintiff who is not directly subject to the regulatory action that he seeks to challenge falls within the zone of interests.² As to such plaintiffs,

² None of the plaintiffs is directly subject to the regulatory action. Rather, it is the Bureau of Reclamation which would be required to act if any rules regarding reservoir water levels are ultimately adopted. We do not consider here when a directly regulated entity, or a party standing in the shoes of such an entity, would have standing.

Clarke holds that “the test denies a right of review if the plaintiff’s interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot be reasonably assumed that Congress intended to permit the suit.” *Clarke*, 479 U.S. at 399, 107 S.Ct. at 757; see also *Central Arizona*, 990 F.2d at 1538-39 (9th Cir.1993) (quoting same).

Clarke explains that the zone of interests test simply provides a method of determining whether Congress intended to permit a particular plaintiff to bring an action. As the *Clarke* Court made clear, “at bottom the reviewability question turns on congressional intent, and all indicators helpful in discerning that intent must be weighed.” *Clarke*, 479 U.S. at 400, 107 S.Ct. at 757. Thus, *Clarke* concludes that the statutory purposes should be divined by considering the particular statutory provision that underlies the complaint within “the overall context” of the act itself. *Clarke*, 479 U.S. at 401, 107 S.Ct. at 758.

III.

We have previously applied the zone of interests test to claims brought directly under the ESA. See *Pacific Northwest Generating Co-Op v. Brown*, 38 F.3d 1058, 1065 (9th Cir.1994); *Mt. Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1581 & n. 8 (9th Cir.1993). However, the plaintiffs contend that these cases do not conclusively demonstrate that the zone of interests test applies here. They argue that the question of the test’s application is an open one because our past cases did not consider whether the ESA’s citizen-suit provision overrides the limitation on standing that the test imposes. 16 U.S.C. § 1540(g); see

Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100, 99 S.Ct. 1601, 1608, 60 L.Ed.2d 66 (1979) (holding that Congress may extend standing under a statute to the limits of Article III).³ The provision in question authorizes "any person [to] commence a civil suit on his own behalf - a) to enjoin any person, including the United States [and its agencies], who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof. . . ." See 16 U.S.C. § 1540(g).

We need not rely on our decisions in *Mt. Graham and Pacific Northwest*. Rather, notwithstanding the broad language of the citizen-suit provision, we directly reject the plaintiffs' contention that it renders the zone of interests test inapplicable to claims brought under the ESA.⁴ Our

³ There is a division in the circuits as to whether the zone of interests test applies to ESA suits. The District of Columbia Circuit, notwithstanding the citizen-suit provision, has expressly held that the zone of interests test applies. *State of Idaho By and Thru Idaho Public Utilities Commission v. ICC*, 35 F.3d 585, 592 (D.C.Cir.1994); see also *Humane Society of the United States v. Hodel*, 840 F.2d 45 (D.C.Cir.1988); *National Audubon Society v. Hester*, 801 F.2d 405, 407 (D.C.Cir.1986). By contrast, the Eighth Circuit has concluded that ESA's citizen-suit provision necessarily abrogated any zone of interests test. See *Defenders of Wildlife v. Hodel*, 851 F.2d 1035, 1039 (8th Cir.1988), opinion after remand, 911 F.2d 117 (8th Cir.1990), *rev'd on other grounds sub nom., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

⁴ We note that, whether or not the zone of interests test applies, the class of plaintiffs that Congress had in mind was necessarily more limited than the literal language of the citizen-suit provision suggests. As *Lujan* makes clear, Congress may not permit suits by those who fail to satisfy the constitutionally-mandated standing requirements. For that reason, suits under

conclusion follows from the fact that our court, and others, have regularly employed the zone of interests test in determining standing despite Congress' enactment of expansive citizen-suit provisions.

For example, in *Gonzales v. Gorsuch*, 688 F.2d 1263, 1266 (9th Cir.1982), we considered whether a plaintiff had standing under the Clean Water Act's citizen-suit provision to complain that the EPA was unlawfully expending funds for purposes other than the improvement of water quality. In answering the question, we considered not only the provision of the statute which permitted "any citizen" to sue for a violation of the Act, but also the legislative history. We concluded that the plaintiff had standing because the citizen-suit provision was "intended to grant standing to a nationwide class, comprised of citizens *who alleged an interest in clean water.*" *Id.* (emphasis added).

Subsequent to *Gonzales*, we concluded that the Clean Water Act's citizen-suit provision did not confer standing on a plaintiff who claimed that the government's failure to comply with the statute deprived him of grant funds. See *Dan Caputo Co. v. Russian River County Sanitation*, 749 F.2d 571, 575 (9th Cir.1984). We based our holding on the fact that the plaintiff's injury did not "arise from an interest in the environment," and the fact that he did "not seek to vindicate environmental concerns." *Id.*

the ESA, no less than suits under any statute, are clearly not available to "any person" in the broadest possible sense of that term. See *Lujan*, 504 U.S. at 570-580, 112 S.Ct. at 2142-2146.

We applied a similar analysis in construing a different statute. In *Alvarez v. Longboy*, 697 F.2d 1333, 1337 (9th Cir.1983), we considered whether a provision of the Farm Laborer Contractor Registration Act (FLCRA) that permitted suit by "[a]ny person claiming to be aggrieved" by a violation of the act conferred standing on migrant workers to sue farm labor contractors with whom they had no contract. See 7 U.S.C. § 2050a(a).⁵ We concluded that it did, but only after carefully considering the overall purposes of the act to determine whether the particular plaintiff fell within the zone of interests that the statute protected. *Alvarez*, 697 F.2d at 1337-38.

The Eleventh Circuit employed the same approach in construing the FLCRA. *Davis Forestry Corporation v. Smith*, 707 F.2d 1325, 1328 (11th Cir.1983). After analyzing the purposes of the act, the court concluded that the provision authorizing suits under the FLCRA did not confer standing on competitors of farm labor contractors to bring an action for a violation of the statute. It explained that their claimed injury fell outside "the zone of interests sought to be protected" by the statute. *Id.* In so concluding, the court explained that:

The FLCRA was designed to alleviate a parade of horrors being inflicted upon farm laborers (primarily migrant farm workers). While "any person" may be read to include many possibilities, we do not find any basis for extending it

⁵ The inclusion of the language "claiming to be aggrieved" does not distinguish the statute from the one we consider here. As we have explained, the constitution necessarily limits standing to plaintiffs who are, at the least, aggrieved; i.e., persons who suffer constitutional injury.

to [the plaintiff] for the type of claim alleged here.

Id. at 1329.

In sum, the fact that a statute contains a citizen-suit provision does not necessarily establish that Congress intended that any particular plaintiff have standing to assert a violation. In light of our consistent use of the zone of interests test in determining the standing of plaintiffs who have sued under citizen-suit provisions, we hold that the ESA does not automatically confer standing on every plaintiff who satisfies constitutional requirements and claims a violation of the Act's procedures. A contrary ruling would permit plaintiffs to sue even though their purposes were plainly inconsistent with, or only "marginally related" to, those of the Act. *Clarke*, 479 U.S. at 399, 107 S.Ct. at 757. Thus, we apply the zone of interests test here.

IV.

Having concluded that the zone of interests test applies, we must next determine whether the ESA protects plaintiffs who assert an interest of the type asserted here. We answer that question in the negative, holding that only plaintiffs who allege an interest in the preservation of endangered species fall within the zone of interests protected by the ESA. Because the plaintiffs have not alleged such an interest in their complaint, they do not have standing.

In reaching our conclusion, we follow the approach that we have adopted in applying the zone of interests test to claims brought pursuant to other environmental

statutes. In those cases, we declined to confer standing on plaintiffs who asserted interests similar to those that underlie the claims in this case; we concluded that the asserted interests were not tied to the environmental purposes served by the respective statutes. For example, as we have explained *supra* at page 10656, we denied standing under the Clean Water Act to a plaintiff who sought grant funds but did not assert an interest that "ar[ose] from an interest in the environment" or "environmental concerns." See *Dan Caputo Co. v. Russian River County Sanitation*, 749 F.2d 571, 575 (9th Cir.1984). Similarly, we held that plaintiffs do not have standing under NEPA to protect "purely" economic interests, because the environmental purposes of the Act would not be furthered by permitting suits premised on such interests. See *Nevada Land Action Ass'n v. U.S. Forest Service*, 8 F.3d 713, 716 (9th Cir.1993).

We see no reason why the ESA should be construed in a different manner from either NEPA or the Clean Water Act.⁶ The overall purposes of the ESA are

⁶ *Central Arizona Water Conservation Dist. v. United States Environmental Protection Agency*, 990 F.2d 1531 (9th Cir.1993), is not inconsistent with our analysis. In *Central Arizona*, although we conferred standing on water districts that sued to recoup the "compliance costs" imposed by the Clean Air Act, we did not consider the general question of whether the Clean Air Act protects the interests of plaintiffs who assert no interest in clean air. Instead, in our opinion, we concluded that the districts had standing because they were contractually "require[d]" to pay a substantial portion of the multi-million dollar "compliance costs" that the Act imposed directly on the Bureau of Reclamation. *Central Arizona*, 990 F.2d at 1537-1539. In *Central Arizona*, the water districts stood in the same position as the Bureau of

singularly devoted to the goal of ensuring species preservation; they do not embrace the economic and recreational interests that underlie the plaintiffs' challenge. Our conclusion is based in part on the Supreme Court's own exhaustive review of the purposes of the ESA in *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184, 98 S.Ct. 2279, 2296-97, 57 L.Ed.2d 117 (1978) (emphasis added). There, the Court concluded that:

[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. That is reflected not only in the stated policies of the Act, but in literally every section of the statute.

See also *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, ___ U.S. ___, 115 S.Ct. 2407, 2413, 132 L.Ed.2d 597 (1995) (quoting same). The Court went on to point out that even the citizen-suit provision, on which the plaintiffs rely, was designed to serve the goal of species protection by permitting "interested persons" to sue to enforce the Act. *Id.* at 181, 98 S.Ct. at 2295 (emphasis added).

Moreover, a review of the section of the ESA that sets forth the Act's purposes bears out the Court's analysis. That section provides no basis for concluding that the plaintiffs' interest in obtaining water that the government deems critical to the survival of endangered fish is a

Reclamation, the entity that the Clean Air Act regulated directly. As we noted earlier, the zone of interests test does not apply in such circumstances. *Clarke*, 479 U.S. at 400, 107 S.Ct. at 757; *supra*, note 2.

protected one. Rather, the statute declares that its purposes are:

to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

16 U.S.C. § 1531(b). It was a similar declaration of purpose that we relied upon in concluding that a plaintiff's economic interest fell outside the zone of interests protected by NEPA. See *Nevada Land Action*, 8 F.3d at 716 (quoting the purposes section of NEPA). Given that the clear purpose of the ESA is to ensure the protection of endangered species, we conclude that suits by plaintiffs who are interested only in avoiding the burdens of that preservation effort "are more likely to frustrate than to further statutory objectives." *Nevada Land Action*, 8 F.3d at 716 (quoting *Clarke*, 479 U.S. at 397 n. 12, 107 S.Ct. at 756 n. 12).

Our conclusion echoes some of the views that we recently expressed in *Pacific Northwest*. In *Pacific Northwest*, hydropower purchasers challenged the government's preparation of a biological opinion that recommended regulating water flow in order to protect endangered salmon. In one of their claims, the hydropower purchasers contended that the opinion's recommendations would yield only "dubious benefit to the listed species" and did not adequately consider the impact that the proposed regulations would have on their

industry. *Pacific Northwest*, 38 F.3d at 1067. We explained that such a claim went beyond the bounds of the standing that the ESA confers.

On analysis, a portion of this claim goes beyond the basis for the plaintiffs' standing because it focuses on the increases in cost to hydropower operations. The plaintiffs are entitled to standing because preservation of the salmon will, in the long run, reduce their cost. *But the plaintiffs are not entitled to standing simply to complain about the additional cost imposed on hydropower. Nothing in the Endangered Species Act confers a cause of action for that purpose.*

Pacific Northwest, 38 F.3d at 1067 (emphasis added). *Pacific Northwest* said, in effect, that as to a portion of their claim, the plaintiffs were not entitled to standing because they failed to assert an interest in preserving a threatened or endangered species.⁷

⁷ *Pacific Northwest* did not clearly state whether it was concluding that the ESA denied the plaintiffs standing or a cause of action. However, the distinction between "standing" and "cause of action" is often "only a matter of semantics," *National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers*, 414 U.S. 453, 467, 94 S.Ct. 690, 697, 38 L.Ed.2d 646 (1974), (Douglas, J., dissenting); *Pacific Northwest*, 38 F.3d at 1067, and the terms are sometimes used interchangeably or confused. See, e.g., *DKT Memorial Fund v. Agency for International Development*, 887 F.2d 275, 286 (D.C.Cir.1989) (explaining that zone of interests standing test and cause of action inquiry often meld into one) (quoting *Cardenas v. Smith*, 733 F.2d 909, 915 (D.C.Cir.1984)); see also *McMichael v. County of Napa*, 709 F.2d 1268, 1273 (9th Cir.1983) (Kennedy, J. concurring). Thus, *Pacific Northwest's* interchangeable use of the two terms does not constitute a departure from our past practice of deeming the question of who may sue for a statutory violation as one that concerns standing. See *Alvarez v.*

Here, the plaintiffs make no allegation that the government's recommendations will harm the Lost River or shortnose suckers. Instead, they argue that the actions proposed in the biological opinion are not necessary to preserve the fish. In their claims regarding consultation and designation of critical habitat, they seek only to obtain a greater share of the water and do not contend that compliance with the Act will *improve* the fish's lot. Indeed, they tell us that the suckers are doing just fine. Thus, their complaint belies any assumption that they seek compliance with the statute in order to further the goal of species preservation. The complaint instead is premised on the contrary position that the fish are "reproducing successfully" and will not be adversely affected by the long-term operation of the Klamath project.

In short, the plaintiffs do not seek to further the statutory purpose. Nor do they allege any community of interest of any kind between themselves and the suckers. To the contrary, they claim a competing interest – an interest in using the very water that the government believes is necessary for the preservation of the species. Because the plaintiffs' interests consist solely of an economic (and recreational) interest in the use of water, because their claims are at best "marginally related" to the purposes that underlie the Act, *Clarke*, 479 U.S. at 399,

Longboy, 697 F.2d 1333, 1337 (9th Cir.1983); *Gonzales v. Gorsuch*, 688 F.2d 1263, 1266 (9th Cir.1982); *Dan Caputo Co. v. Russian River County Sanitation*, 749 F.2d 571, 575 (9th Cir.1984). Semantics aside, *Pacific Northwest* followed our traditional approach in assessing the interests asserted by the plaintiffs in that case.

107 S.Ct. at 757, and because, as the district court determined, their interests are inconsistent with the Act's purposes, we conclude that they lack standing.⁸

Finally, we are aware that the ESA specifically provides that the government should consider a variety of factors – including economic ones – in designating critical habitat for a species. See 16 U.S.C. § 1533(b)(3). The Act's inclusion of such directives does not alter our analysis. We do not believe that in setting forth the factors to be weighed in formulating a plan for protecting species, Congress intended to do more than ensure a rational decision-making process by providing guidance for government officials. Certainly, it did not intend impliedly to confer standing on every plaintiff who could conceivably claim that the failure to consider one of those factors adversely affected him. See *Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918, 922 (D.C.Cir.1989) (holding that the fact that Congress mandates that certain methods be used to achieve its goals does not express its intent to benefit every person who has an interest in those methods being followed). To interpret the statute in the manner suggested by plaintiffs would be to transform provisions designed to further species protection into the means to frustrate that very goal. See *Clarke*, 479 U.S. at 397 n. 12, 107 S.Ct. at 756 n. 12. Accordingly, we hold that the plaintiffs have no standing under the ESA.

⁸ The fact that the ranchers allege that they have an aesthetic and recreational interest in lower lake levels does not change anything. That interest – even though not economic in nature – does not serve the purpose of preserving any endangered species. Thus, it is not an interest protected by the ESA.

V.

Because the plaintiffs have failed to assert an interest protected by the ESA, they necessarily have no standing under the APA. *Yesler Terrace*, 37 F.3d at 447 (zone of interests test applies to the APA). We also need not consider whether the plaintiffs have standing under the National Environmental Policy Act. Under the doctrine of hypothetical jurisdiction, we may dismiss a claim on the merits, if they are clear, in order to avoid a difficult jurisdictional inquiry. *Clow v. U.S. Department of Housing & Urban Development*, 948 F.2d 614, 616-17 n. 2 (9th Cir.1991). Here, as the plaintiffs concede, *Douglas County* squarely holds that no NEPA claim lies for a violation of the ESA's provisions for determining critical habitat. *Douglas County*, 48 F.3d at 1502. Accordingly, even if we assume that the plaintiffs have standing under NEPA, they have failed to state a claim under that Act.

VI.

Because the plaintiffs lack standing to sue under either the ESA or the APA, and because they have failed to state a claim under NEPA, we affirm the district court.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BRAD BENNETT, et al.,)	
)	
Plaintiffs,	)	Civil No.
	)	93-6076-HO
v.	)	ORDER
MARVIN L. PLENERT, et al.,	)	(Filed ____)
)	
Defendants.)	
)	

Plaintiffs filed this action for declaratory and injunctive relief under the Endangered Species Act (ESA) citizens suit provision, 16 U.S.C. § 1540(g)(1)(c), alleging violations of ESA, 16 U.S.C. §§ 1531 et seq., and its implementing regulations, 50 CFR part 402, the National Environmental Policy Act of 1969, as amended (NEPA), 42 U.S.C. § 4321, et seq., and the Administrative Procedure Act (APA), 5 U.S.C. § 551 et seq.

Plaintiffs seek to compel defendants to withdraw portions of a biological opinion issued by the Fish and Wildlife Service (FWS) on July 22, 1992, pursuant to the agency consultation provisions of ESA.

Plaintiffs allege "(t)he Biological Opinion improperly concludes that continued operation of Clear Lake reservoir in Northern California and Gerber reservoir in Southern Oregon by the Bureau of Reclamation ("BOR") jeopardizes two endangered species, the Lost River Sucker and the shortnose sucker." As a consequence of its erroneous jeopardy conclusion, the Biological Opinion improperly seeks to impose restrictions on the BOR's

operation of Clear Lake reservoir and Gerber reservoir." Complaint (#1), p. 2. Plaintiffs allege that the "restrictions on lake levels imposed by the Biological Opinion adversely affect plaintiffs by substantially reducing the quantity of available irrigation water." *Id.*, p. 9.

Plaintiffs also allege "(b)y imposing restrictions on lake levels in Clear Lake and Gerber Reservoirs, the Biological Opinion implicitly determines critical habitat for the endangered suckers" without consideration of the economic impact of that determination, as required by section 4 of ESA, 16 U.S.C. § 1533(b)(2)," *Ibid.*, and that designation of critical habitat is a major federal action to which NEPA procedural requirements apply. Complaint (#1), p. 10.

Defendants move to dismiss the complaint (#4) on the ground that plaintiffs lack standing. Defendants maintain that the biological opinion "is a non-binding opinion which in and of itself does not cause any injury to plaintiffs." Federal Defendants' Memorandum (#4), pp. 2-3. Defendants also contend that plaintiffs lack standing because their alleged injury is not "a result of the Secretary's *failure* to conserve the two species of fish" nor can it "be fairly traced to an alleged *violation* of the Secretary's obligations under ESA section 7(a)(1)." Federal Defendants Reply (#9), p. 6. Defendants contend plaintiffs' *de facto* designation of critical habitat claim should be denied because the "issuance of a biological opinion does not constitute a designation of critical habitat." Federal Defendants' Memorandum (#4), p. 3.

Statutory requirements: Section 7 of ESA requires each federal agency to "insure that any action authorized,

funded or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species." 16 U.S.C. § 1536 (a)(2).

To fulfill this obligation, agencies are required to consult with the Secretary of the Interior (through the FWS) or the Secretary of Commerce (through the National Marine Fisheries Service - "NMFS") depending on the species involved. The two secretaries have developed regulations governing the consultation process. See 50 CFR Part 402.¹

If during informal consultation the agency determines, with the written concurrence of the Service, that the action is not likely to adversely affect a listed species of critical habitat, the consultation process is terminated and no further action is necessary. 50 CFR §§ 402.13(a); 402.14(b)(1).

If the agency determines that the proposed action may affect a listed species, formal consultation is required. 50 CFR § 402.14(a). Following consultation, the Service issues a biological opinion "detailing how the agency action affects the species or its critical habitat." 16 U.S.C. §1536(b)(3)(A). If jeopardy or adverse modification is found, the Secretary "shall suggest those reasonable and prudent alternatives" which he believes would not

¹ The species at issue in this case are under the auspices of the Secretary of the Interior. Therefore, all references to "the Secretary" refer to the Secretary of the Interior; references to "the Service" refer to FWS.

violate the agency's duty under section 1536(a)(2). *Ibid.* See also, 50 CFR Subpart A - § 402.01.

Although the primary responsibility for implementing section 7 of ESA is on the Secretary, the ultimate obligation to comply with the substantive obligation under 16 U.S.C. §1536 (a)(2) is on the agency.

Federal agencies are required to consult and obtain the assistance of the Secretary before taking any actions which may affect endangered species or critical habitat. However, once an agency has had meaningful consultation with the Secretary of Interior concerning actions which may affect an endangered species the final decision of whether or not to proceed with the action lies with the agency itself. Section 7 does not give the Department of Interior a veto over the actions of other federal agencies provided that the required consultation has occurred.

National Wildlife Federation v. Coleman, 529 F.2d 359, (5th Cir. 1976), cert. den. 429 U.S. 979 (1976).

See also, remarks of Senator Tunney, floor manager of the ESA bill in the United States Senate. ["So, as I read the language (of section 7), there has to be consultation. However, the Bureau of Public Roads or any other agency would have the final decision as to whether such a road should be built. That is my interpretation of the legislation at any rate." 119 Cong. Rec., S. 14536 (July 24, 1973).]

The Ninth Circuit has stated in describing the ESA process: "If the biological opinion concludes that the proposed action would jeopardize the species or destroy or adversely modify critical habitat . . . the action may not

go forward unless the F & WS can suggest an alternative that avoids such jeopardization, destruction, or adverse modification. *Id.* §1536(b)(3)(A)." *Thomas v. Petersen*, 753 F.2d 754, 763 (9th Cir. 1985).

16 U.S.C. § 1536(b)(3)(A) does not necessarily support the *Thomas* court's conclusion that "the action may not go forward." In addition, I find this dicta in *Thomas v. Petersen* is not controlling in view of *Sierra Club v. Marsh*, 816 F.2d 1376 (9th Cir. 1987). In that case, the Army Corp of Engineers declined the FWS's request to initiate the consultation process. Citing *National Wildlife Federation v. Coleman*, *supra*, the court held: "The ESA does not give the FWS the power to order other agencies to comply with its requests or to veto their decisions." *Id.*, p. 1386.

The interpretation that biological opinions are not binding on the action agency is also supported by the finding in *Pyramid Lake Paiute Tribe v. U.S. Dept of Navy*, 898 F.2d 1410, 1418 (9th Cir. 1990) that "non Interior" agencies have the discretion whether to implement conservation recommendations put forth by the FWS. See also, 50 CFR §402.14(j) ["Conservation recommendations. The Service may provide with the biological opinion a statement containing discretionary conservation recommendations. Conservation recommendations are advisory and are not intended to carry any binding legal force."].

See also, *Roosevelt Campobello Intern. Park v. U.S.E.P.A.*, 684 F.2d 1041, 1049 (1st Cir. 1982). ["An agency's duty to consult with the Secretary of Commerce or Interior, depending on the particular endangered species, does not divest it of discretion to make a final decision that 'it has taken all necessary action to insure that its actions will

not jeopardize the continued existence of an endangered species.' "] Citing *National Wildlife Federation v. Coleman*, *supra*.

Based on the foregoing, I find that the Secretary's biological opinion is advisory in nature and does not compel compliance with its recommendations or require agencies to act or refrain from acting in any particular manner.²

Consultation between FWS and BOR: In this case, the BOR requested formal consultation with FWS after completing a biological assessment which found that three listed species may be affected by the long term operation of the Klamath Basin Project. *See*, Federal Defendants' Memorandum (#4), Exhibit 1.

On July 22, 1991, FWS issued its biological opinion finding that the long-term operation of the Klamath Project was likely to jeopardize the continued existence of the Lost River and shortnose suckers. Federal Defendants' Memorandum (#4), Exhibit 5, p. 2. The Service recommended a number of measures the BOR could take to avoid jeopardy to the suckers, *Id.*, pp. 36-39, including the recommendations regarding maintaining minimum lake levels at issue in this case.

² Although the Regional Director of BOR indicated to the Regional Director of FWS that the BOR "intends to comply with the requirements of the Biological opinion issued on July 22, 1992, concerning the long-term operation of the Klamath Project." (emphasis added) Federal Defendants Memorandum (#4), Exhibit 6.

On August 19, 1992, the BOR notified FWS that it accepted the conclusions of the biological opinion and that it intended to comply with the recommendations of the Service. Federal Defendants' Memorandum (#4), Exhibit 6.

Standing: The "irreducible constitutional minimum" of standing requires three elements: (1) an injury in fact – an invasion of a legally protected interest which is concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the conduct complained of – the injury must be "fairly traceable to the challenged action of the defendant and not the result of some third party not before the court; and, (3) it must be likely as opposed to merely speculative that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, ___ U.S. ___ 112 S.Ct. 2130, 2136 (1992).³

When a plaintiff's challenge to an agency action or inaction is premised upon the allegedly unlawful regulation or lack of regulation of someone else, standing is "substantially more difficult" to establish. *Id.*, p. 2137. Where an injury results from "the independent action of some third party not before the court," a federal court lacks jurisdiction under Article III. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41 (1976). [quoting *Allen v. Wright*, 468 U.S. 737, 758 (1984).]

³ In *Lujan v. Defenders of Wildlife*, the Supreme Court's analysis of standing to support an ESA claim was limited to the application of Article III (constitutional) requirements. *Compare*, *Lujan v. National Wildlife Federation*, 497 U.S. 871, 883 (1990) (applying 'zone of interests' test to NEPA-FLMPA/APA claims).

Discussion: Defendants contend plaintiffs' complaint "fails to allege an injury that can fairly be traced to the challenged action, or that is likely to be redressed by a decision in their favor." Federal Defendants' Memorandum (#4), p. 10. Defendants argue that plaintiffs' alleged injury arises from restrictions on the use of water from the Klamath Project. "These restrictions, however have not been imposed by the Fish and Wildlife Service; rather, the Bureau of Reclamation, who plaintiffs have not joined, and is consequently not before this court." *Id.*, p. 11.

Defendants argue the biological opinion is not reviewable under the APA because it is "merely a recommendation, that the action agency may choose to adopt, or reject" and not a final agency action. Federal Defendants' Memorandum (#4), p. 14.

In plaintiffs' reply to defendants' motion to dismiss (#8), plaintiffs contend their "claim is not against the Fish and Wildlife Service as defendants state. It is against the Secretary of the Interior" and that "(t)he process giving rise to this action is the 'review' process, not the 'consultation' process required by Congress." Plaintiffs' Reply (#8), p. 2.

I agree with defendants that plaintiffs' reply "recharacterizes" their claims under ESA. See Federal Defendants' Reply (#9). However, because a motion to dismiss requires the court to determine whether plaintiffs have alleged "any set of facts in support of his claim which would entitle (them) to relief," *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), it is appropriate to consider plaintiffs' "recharacterized" claim.

However, I find it is not necessary to decide these issues because plaintiffs fail to meet a more fundamental standing requirement.

Plaintiffs interest in this case, the use of Klamath Project water for "recreational, aesthetic and commercial purposes," Complaint (#1), p. 4, conflict with the Lost River and shortnose suckers' interest in using the water for habitat. Plaintiffs do not have standing under ESA based on an interest which conflicts with the interests sought to be protected by the Act.

This court recently rejected a claim similar to plaintiffs' claim in this case. In *Pacific Northwest Generating Cooperative v. Brown*, Civ Nos. 97-973, 92-1260, and 92-1264 (D. Or. April 1, 1993), Judge Marsh held that plaintiff hydropower users lacked standing to challenge a biological opinion issued by the National Marine Fisheries Service regarding the effects of the Columbia River Power System hydropower operations on endangered species of salmon. The court held that the injury alleged by plaintiffs as a result of the consultation (an increase in the cost of hydropower) lacked Article III standing requirements of causation and redressability. The court further held that where plaintiffs' interests conflicted with the species they purport to represent in their claims, the case or controversy requirement of Article III was not satisfied and plaintiffs lacked standing.

When [plaintiffs] invoke the Endangered Species Act and seek to specifically enforce its terms, ultimately they run headlong into a classic conflict of interest - by invoking the ESA they purport to represent the interest of the listed species. Yet, when push comes to shove, if

the resources become so scarce that truly hard choices must be made, plaintiffs' asserted interests in the listed species may yield to the basis for their claimed "injury" for standing under ESA - their interest in power and water for hydroelectric use.

Pacific Northwest Generating Cooperative v. Brown, supra, p. 62.

Similarly, the "zone of interest" standing requirement would preclude review under the APA. ESA is designed "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, and to provide a program for the conservation of such endangered and threatened species. . . ." 16 U.S.C. §1531(b). Therefore, the recreational, aesthetic, and commercial interests advanced by plaintiffs do not fall within the zone of interests sought to be protected by ESA.

Conclusion: Based on the reasoning in *Pacific Northwest Generating Cooperative v. Brown, supra*, Defendants' motion to dismiss (#4) based on lack of standing is allowed.⁴

⁴ I am not persuaded that the Secretary's biological opinion at issue in this case constitutes a "*de facto*" determination of critical habitat for the Lost River and shortnose suckers, for purposes of plaintiff's third and fourth claims for relief, particularly in view of *Wood, et al. v. Plenert, et al.*, Civ. No 91-6496-TC (D. Or.) currently pending in this court. However, nothing in this opinion should be construed as precluding a NEPA claim independent of ESA, i.e., if the implementation of the biological opinion was found to be a "major federal action . . .," NEPA procedural requirements may apply. However, such a determination could not be premised upon the assumption that the biological opinion constitutes designation of critical habitat under 16 U.S.C. § 1533.

DATED this 18th day of November, 1993.

/s/ Michael R. Hogan
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BRAD BENNETT, et al

Plaintiffs.

v.

MARVIN L. PENERT, et al

Defendants.

Civil No.
93-6076-HO

JUDGMENT

This action is dismissed.

Dated: November 19, 1993.

Donald M. Cinnamond, Clerk

by /s/ Lea Force
Lea Force, Deputy

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

BRAD BENNETT, an individual;)

MARIO GIORDANO, an)

individual; LANGELL VALLEY)

IRRIGATION DISTRICT, a)

political subdivision of)

the State of Oregon;)

HORSEFLY IRRIGATION)

DISTRICT, a political subdivision)

of the State of Oregon,)

Plaintiffs,)

vs.)

MARVIN L. PENERT, in his)

official capacity as Regional)

Director, Region One, Fish and)

Wildlife Service, United States)

Department of the Interior;)

Case No.
93-6076-HO

COMPLAINT
FOR
DECLARATORY
AND
INJUNCTIVE
RELIEF

JOHN F. TURNER, in his official)
 capacity as Director, Fish and)
 Wildlife Service, United States)
 Department of the Interior; and)
 BRUCE BABBITT, in his official)
 capacity as Secretary, United)
 States Department of the Interior,)
 Defendants.)

PRELIMINARY STATEMENT

1. This is an action for declaratory judgment. Plaintiffs seek to compel Defendants to withdraw portions of the biological opinion issued by the Fish and Wildlife Service on July 22, 1992, ("the Biological Opinion"), pursuant to the agency consultation provisions of the Endangered Species Act ("ESA"). A copy of the Biological Opinion is attached hereto and incorporated herein as Exhibit B. The Biological Opinion improperly concludes that continued operation of Clear Lake reservoir in northern California and Gerber reservoir in southern Oregon by the Bureau of Reclamation ("BOR") jeopardizes two endangered species, the Lost River sucker and the shortnose sucker. As a consequence of its erroneous jeopardy conclusion, the Biological Opinion improperly seeks to impose restrictions on the BOR's operation of Clear Lake reservoir and Gerber reservoir. In addition, until the Biological Opinion was issued, critical habitat for the Lost River sucker and the shortnose sucker has never been determined by defendants, and these restrictions are invalid for that reason as well. On information and belief, Plaintiffs allege that the BOR will abide by the restrictions imposed by the Biological Opinion.

2. This action arises under and alleges violations of the ESA, 16 U.S.C. §§ 1531 *et seq.*, and its implementing regulations, 50 C.F.R. Part 402, the National Environmental Policy Act of 1969 (as amended) (the "NEPA"), 42 U.S.C. 4321, *et seq.*, and the Administrative Procedure Act (the "APA"), 5 U.S.C. §§ 551 *et seq.*

JURISDICTION AND VENUE

3. Jurisdiction over this action is conferred by 16 U.S.C. § 1540 (g)(1)(C) (ESA citizens' suit) and 28 U.S.C. §§ 1331 (federal question), and 2201 (declaratory relief). A copy of plaintiffs' 60-day Notice of Intent to Sue, dated November 12, 1992, is attached hereto as Exhibit A.

4. Venue is properly in this Court pursuant to 28 U.S.C. § 1391(e), as some or all of the plaintiffs reside in this district and a substantial part of the events or omissions giving rise to the claim occurred in this district.

PARTIES

5. The plaintiffs in this action are:

A. Brad Bennett ("Bennett"), a rancher who resides near Bonanza, Oregon, and who receives most of his irrigation water from Clear Lake reservoir. Brad Bennett's ranch is located within the Horsefly Irrigation District.

B. Mario Giordano ("Giordano"), a rancher who resides near Bonanza, Oregon, and who receives irrigation water from Clear Lake reservoir. Mario Giordano's ranch is located within the Langell Valley Irrigation District.

C. Horsefly Irrigation District ("HID") is a political subdivision of the State of Oregon organized pursuant to Oregon Revised Statutes chapter 545 for the purpose of delivering irrigation water to its patrons within the District. The District is located in Klamath County, Oregon, and it receives irrigation water from Clear Lake reservoir in northern California via the Lost River, pursuant to contracts with the United States. The District office is located in Oregon in the town of Bonanza.

D. Langell Valley Irrigation District ("LVID") is a political subdivision of the State of Oregon organized pursuant to Oregon Revised Statutes chapter 545 for the purpose of delivering irrigation water to its patrons within the District. The District is located in Klamath County, Oregon, and it receives irrigation water from Gerber reservoir via Miller Creek and Clear Lake reservoir in northern California via Lost River, pursuant to contracts with the United States. The District office is located in Oregon near the town of Bonanza, Oregon.

6. Plaintiffs use Gerber reservoir, Clear Lake reservoir, Miller Creek, and Lost River for recreational, aesthetic and commercial purposes, as well as for their primary sources of irrigation water. Plaintiffs' use of Clear Lake reservoir, Gerber reservoir, Miller Creek, and Lost River will be irreparably damaged by defendants' disregard of their statutory duties, as described below, and by the unlawful restrictions placed by defendants on the use of Clear Lake reservoir and Gerber reservoir.

7. Unless the relief prayed for herein is granted, the above-described recreational, aesthetic, commercial, and procedural interests of plaintiffs will be adversely

affected and irreparably injured by the erroneous conclusion of defendants that the BOR's continued operation of Clear Lake reservoir and Gerber reservoir will likely jeopardize the survival of the Lost River sucker and the shortnose sucker unless restrictions are placed on such operation.

8. The defendants in this action are:

A. Marvin L. Plenert, in his official capacity as director of Region One of the Fish and Wildlife Service, United States Department of the Interior. Region One of the Fish and Wildlife Service includes Clear Lake reservoir and Gerber reservoir. The Biological Opinion was issued by the Region One office of the Fish and Wildlife Service.

B. John F. Turner is the Director of the Fish and Wildlife Service, United States Department of the Interior.

C. Bruce Babbitt is the Secretary of the United States Department of the Interior (the "Secretary"). The Secretary is empowered by the ESA to make jeopardy determinations concerning threatened and endangered species pursuant to 16 U.S.C. § 1536(b)(3)(A).

FACTS

9. Clear Lake reservoir and Gerber reservoir were constructed early in the twentieth century in the eastern portion of the Klamath Project by the BOR to provide irrigation water to farmers and ranchers in southern Oregon. Although Clear Lake reservoir and Gerber reservoir are part of BOR's Klamath Project, they are operated separate and distinct from the western portion of the

Klamath Project, which consists of the Klamath River and Upper Klamath Lake in Oregon and Lower Klamath Lake and Tule Lake in California. A diagram showing the bodies of water in the Klamath Project is attached hereto as Exhibit C. The separated systems are different aquariums and aquatic animals within the one cannot naturally move to the other.

10. The Lost River sucker and the shortnose sucker were declared endangered under the ESA in 1988 (53 C.F.R. 27130-27135). Both species have been found in the various bodies of water of the Klamath Project, including Clear Lake reservoir, but only the shortnose sucker has been found in Gerber reservoir.

11. Critical habitat for these species of suckers has never been determined by the Secretary, despite the ESA's mandate that he do so "to the maximum extent prudent and determinable" under 16 U.S.C. § 1533(a)(3) at the same time the Secretary declares them endangered. Defendants are responsible for determining critical habitat.

12. The BOR has been following essentially the same procedures for storing and releasing water from Clear Lake and Gerber reservoirs throughout the twentieth century, up to the present day. No natural phenomenon or human activity has substantially modified the aquatic environments of Gerber reservoir and Clear Lake reservoir since their construction except that the Department of Fish & Game of the State of California installed the Sacramento Perch within the Clear Lake Reservoir.

13. There is no scientifically or commercially available evidence indicating that the populations of endangered suckers in Clear Lake and Gerber reservoirs have declined, are declining, or will decline as a result of any natural phenomena or human activities, including the operations of the BOR in the Klamath Project. To the contrary, the scientifically and commercially available evidence indicates that the populations of endangered suckers in Clear Lake and Gerber reservoirs are not declining and are reproducing successfully.

14. As a result of concerns over population declines of the endangered suckers in the Klamath River system in the Western portion of the Klamath Project, the BOR initiated consultation with the Fish and Wildlife Service in 1990 pursuant to section 7 of the ESA, 16 U.S.C. § 1536. The Biological Opinion is the result of that consultation and was issued pursuant to section 7(b)(3)(a) of the ESA, 16 U.S.C. § 1536(b)(3)(a).

15. The Biological Opinion makes the following conclusion:

Biological Opinion

It is our biological opinion that the long-term operation of the Klamath Project as described under the *Description of the Proposed Action*, is likely to jeopardize the continued existence of the Lost River and shortnose suckers. It is our biological opinion that the proposed Project operation is not likely to jeopardize the continued existence of the bald eagle. Critical habitat has not been designated for any of these three species.

16. The Biological Opinion notes that "Both Lost River and shortnose suckers are long-lived, highly fecund, and well adapted to surviving drought conditions." (Biological Opinion, p. 18). The Biological Opinion points out that sucker habitat in Clear Lake differs from that in the western portion of the Project, at Klamath Lake and Upper Klamath Lake, "because Clear Lake appears to have relatively stable sucker populations, has virtually no aquatic vegetation, and exhibits wider fluctuations in lake elevations during most years." (Biological Opinion, p. 18). The Biological Opinion attributes the stability of the sucker populations in Clear Lake to its good water quality, in comparison to the poor water quality in Klamath Lake and Upper Klamath Lake, where sucker populations have declined. (Biological Opinion, p. 18).

17. The Biological Opinion admits that little is known about the endangered sucker population in Gerber reservoir, although a study in May of 1992 found over 200 shortnose suckers with a broad range in size, "... which indicates that the population of shortnose suckers in Gerber reservoir has successfully recruited in the last few years ..." (Biological Opinion, p. 20). The May 1992 study also found some evidence of stress in the collected specimens, possibly due to low reservoir levels. (Biological Opinion, p. 20). The Biological Opinion notes that 1992 was one of a series of low water years, and that the 17-foot depth of Gerber reservoir at its lowest level, likely to be reached in October, 1992, should be sufficient to maintain a population of suckers. (Biological Opinion, p. 20).

18. Without any supporting citations, the Biological Opinion states:

Formally (*sic*) stable populations, such as those in Clear Lake, are now threatened by drought related stresses. Without proposed improvements in water quality and sucker habitat, the future of these suckers is imperiled and the present status of habitat condition makes extinction in most of their current range highly likely.

p. 26.

19. Despite its conclusion that both Clear Lake and Gerber reservoirs have stable populations of endangered suckers which are reproducing successfully during the present drought years, the Biological Opinion imposes restrictions on the withdrawal of water from both reservoirs. Except for compromise years, the restrictions applicable to Clear Lake reservoir include a minimum lake level of 4524.0 feet between February 1 and April 15 annually, during the spawning season, and a minimum lake level of 4523.0 feet during the remainder of the year. (Biological Opinion, at 37). Except for compromise years, the restrictions applicable to Gerber reservoir permit no water releases below 4799.6 feet. (Biological Opinion, at 38).

20. There is no commercially or scientifically available evidence indicating that the restrictions on lake levels imposed in the Biological Opinion will have any beneficial effect on the stable, successfully reproducing populations of suckers in Clear Lake and Gerber reservoirs.

21. The restrictions on lake levels imposed in the Biological Opinion adversely affect plaintiffs by substantially reducing the quantity of available irrigation water.

22. By imposing restrictions on lake levels in Clear Lake and Gerber Reservoirs, the Biological Opinion implicitly determines critical habitat for the endangered suckers. The Biological Opinion does not take into consideration the economic impact of that determination, as required by § 4 of the ESA, 16 U.S.C. § 1533(b)(2). There is abundant commercially and scientifically available evidence as to the substantial negative economic impact of designating the critical habitat of the endangered suckers at the lake levels set by the Biological Opinion.

23. By imposing restrictions on lake levels in Clear Lake and Gerber Reservoirs, the Biological Opinion implicitly determines critical habitat for the endangered suckers. The designation of critical habitat is a major federal action to which NEPA procedural requirements apply.

CLAIMS FOR RELIEF
FIRST CLAIM FOR RELIEF
VIOLATION OF THE ENDANGERED
SPECIES ACT VIOLATION OF
THE ADMINISTRATIVE PROCEDURE ACT

24. Plaintiffs reallege paragraphs 1 through 23 above.

25. Defendants have violated § 7 of the ESA, 16 U.S.C. § 1536, and its implementing regulations, 50 C.F.R. Part 402, by improperly concluding on page 2 of the Biological Opinion that the BOR's continued operation of

the Klamath Project, including Clear Lake and Gerber reservoirs, is likely to jeopardize the continued existence of the Lost River and shortnose suckers. Defendants' violation of the ESA is subject to judicial review under section 11(g) of the ESA, 16 U.S.C. § 1540(g)(1)(C).

26. Defendants' inclusion of Clear Lake and Gerber reservoirs in its jeopardy opinion is arbitrary, capricious, and an abuse of discretion, and violates the APA, 5 U.S.C. § 706(2)(A). Defendants' violation of the APA is subject to judicial review under 5 U.S.C. § 701 *et seq.*

SECOND CLAIM FOR RELIEF
VIOLATION OF THE ENDANGERED SPECIES ACT
VIOLATION OF THE ADMINISTRATIVE
PROCEDURE ACT

27. Plaintiffs reallege paragraphs 1 through 23 above.

28. Defendants have violated § 7 of the ESA, 16 U.S.C. § 1536, and its implementing regulations, 50 C.F.R. Part 402, by improperly imposing restrictions on the withdrawal of irrigation water from Clear Lake and Gerber reservoirs, as specifically set forth in paragraph 19 above. Defendants' violation of the ESA is subject to judicial review under section 11(g) of the ESA, 16 U.S.C. § 1540(g)(1)(C).

29. Defendants' imposition of restrictions on the withdrawal of irrigation water from Clear Lake and Gerber reservoirs is arbitrary, capricious, and an abuse of discretion, and violates the APA, 5 U.S.C. § 706(2)(A). Defendants' violation of the APA is subject to judicial review under 5 U.S.C. § 701 *et seq.*

THIRD CLAIM FOR RELIEF
VIOLATION OF THE ENDANGERED SPECIES ACT
VIOLATION OF THE ADMINISTRATIVE
PROCEDURE ACT

30. Plaintiffs reallege paragraphs 1 through 23 above.

31. Defendants have violated § 4 of the ESA, 16 U.S.C. § 1533(b)(2), and its implementing regulations, 50 C.F.R. Part 402, by implicitly determining critical habitat for the Lost River suckers and the shortnose suckers in Clear Lake and Gerber reservoirs, as more specifically alleged in paragraph 21 above, without considering the economic impact of that determination. Defendants' violation of the ESA is subject to judicial review under section 11(g) of the ESA, 16 U.S.C. § 1540(g)(1)(C).

32. Defendants' failure to consider the economic impact of its critical habitat determination is arbitrary, capricious, and an abuse of discretion and violates the APA, 5 U.S.C. § 706(2)(A). Defendants' violation of the APA is subject to judicial review under 5 U.S.C. § 701 *et seq.*

FOURTH CLAIM FOR RELIEF
VIOLATION OF THE NATIONAL
ENVIRONMENTAL POLICY ACT OF 1969
VIOLATION OF THE ADMINISTRATIVE
PROCEDURE ACT

33. Plaintiffs reallege paragraphs 1 through 23 above.

34. Defendants have violated NEPA, 42 U.S.C. 4332(2)(c) by failing to prepare an environmental assessment prior to determining critical habitat for the Lost River sucker and the shortnose sucker in Clear Lake and Gerber reservoirs, as alleged above, and by failing to consider the economic impact of that determination. Although NEPA has no provision granting judicial review of agency decisions reached in violation of its procedural requirements, defendants' violation of NEPA is subject to judicial review under section 702 of the APA. 5 U.S.C. 702.

35. Defendants' failure to consider the economic impact of its determination of critical habitat is arbitrary, capricious, and an abuse of discretion and violates the APA, 5 U.S.C. 706(2)(A). Defendants' violation of the APA is subject to judicial review under 5 U.S.C. 701, *et seq.*

PRAYER FOR RELIEF

WHEREFORE, plaintiffs request the Court to:

A. Adjudge and declare that defendants have violated the Endangered Species Act and the Administrative Procedure Act by including Clear Lake reservoir and Gerber reservoir in the jeopardy conclusion on page 2 of the Biological Opinion of July 22, 1992.

B. Adjudge and declare that defendants have violated the Endangered Species Act and the Administrative Procedure Act by improperly imposing restrictions on the withdrawal of irrigation water from Clear Lake and Gerber reservoirs in the Biological Opinion of July 22, 1992.

C. Adjudge and declare that defendants have violated the Endangered Species Act and the Administrative Procedure Act by implicitly determining critical habitat for the Lost River suckers and the shortnose suckers in Clear Lake and Gerber reservoirs in the Biological Opinion of July 22, 1992, without considering the economic impact of that determination.

D. Adjudge and declare that defendants have violated the National Environmental Policy Act and the Administrative Procedure Act by implicitly determining critical habitat for the Lost River sucker and the shortnose sucker in Clear Lake and Gerber reservoirs in the Biological Opinion of July 22, 1992, without considering the economic impact of that determination.

E. Set aside the Biological Opinion of July 22, 1992, as unlawful and void of force under the ESA, the NEPA, and the APA.

F. Award plaintiffs their reasonable fees, costs and disbursements, including attorney fees.

G. Grant plaintiffs such further and additional relief as the Court may deem just and proper, including injunctive relief pursuant to 16 U.S.C. Section 1540(g)(1)(A) to implement the foregoing.

Dated: March 8, 1993.

William F. Schroeder,
Larry A. Sullivan,
John T. Schroeder,
W. Alan Schroeder.

By /s/ W.F. Schroeder
W.F. Schroeder
Plaintiffs' lawyers.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRAD BENNETT, et al.,	)	No. 94-35008
Plaintiff-Appellants,	)	D.C. No. 94-35008
v.	)	ORDER
MARVIN L. PLENERT, in his	)	(Filed
official capacity as Regional	)	Oct. 12, 1995)
Director, Region One, Fish and)	
Wildlife Service, U.S. Department)	
of the Interior, et al.,)	
Defendant-Appellees.)	
_____)	

BEFORE: Pregerson, Canby, and Reinhardt, Circuit Judges:

The time for filing a petition for rehearing with a suggestion for rehearing en banc is extended to October 27, 1995. The ex parte application for extension of page limitation is denied.

(6)

Supreme Court, U.S.

FILED

FEB 26 1996

No. 95-813

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

BRAD BENNETT, ET AL., PETITIONERS

v.

MARVIN PLENERT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DREW S. DAYS, III
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20 pp

QUESTION PRESENTED

Whether the courts below correctly held that petitioners, two ranchers and two irrigation districts, could not invoke the citizen suit provision of the Endangered Species Act to challenge a biological opinion issued by the Fish and Wildlife Service.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	8
Conclusion	14
Appendix	1a

TABLE OF AUTHORITIES

Cases:

<i>Allen v. Wright</i> , 468 U.S. 737 (1984)	11
<i>Association of Data Processing Service Organizations, Inc. v. Camp</i> , 397 U.S. 150 (1970)	7
<i>Clarke v. Securities Indus. Ass'n</i> , 479 U.S. 388 (1987)	7
<i>Defenders of Wildlife v. Hodel</i> , 851 F.2d 1035 (1988), after remand, 911 F.2d 117 (8th Cir. 1990), rev'd on other grounds, 504 U.S. 555 (1992)	8
<i>Humane Soc'y v. Hodel</i> , 840 F.2d 45 (D.C. Cir. 1988)	9
<i>Idaho By and Through Idaho Public Utilities Comm'n v. ICC</i> , 35 F.3d 585 (D.C. Cir. 1994)	9
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992)	3, 9, 10, 11
<i>National Audubon Soc'y v. Hester</i> , 801 F.2d 405 (D.C. Cir. 1986)	9
<i>National Wildlife Fed'n v. Coleman</i> , 529 F.2d 359 (5th Cir.), cert. denied, 429 U.S. 979 (1976)	4
<i>Nebraska v. Wyoming</i> , 115 S. Ct. 1933 (1995)	13
<i>Pyramid Lake Paiute Tribe of Indians v. United States Dep't of Navy</i> , 898 F.2d 1410 (9th Cir. 1990)	3, 8, 10
<i>Roosevelt Campobello Int'l Park Comm'n v. EPA</i> , 684 F.2d 1041 (1st Cir. 1982)	4

IV

Cases—Continued:	Page
<i>Sierra Club v. Marsh</i> , 816 F.2d 1376 (9th Cir. 1987)	3
<i>Simon v. Eastern Kentucky Welfare Rights Org.</i> , 426 U.S. 26 (1976)	10, 11
<i>Tribal Village of Akutan v. Hodel</i> , 869 F.2d 1185 (9th Cir. 1988), cert. denied, 493 U.S. 873 (1989)	3-4
Constitution, statutes and regulations:	
U.S. Const. Art. III	9
Endangered Species Act, 16 U.S.C. 1531 <i>et seq.</i> :	
§ 2(b), 16 U.S.C. 1531(b)	2
§ 3(15), 16 U.S.C. 1532(15)	2
§ 4, 16 U.S.C. 1533	2, 11
§ 4(a)(3), 16 U.S.C. 1533(a)(3)	12
§ 4(b)(2), 16 U.S.C. 1533(b)(2)	12
§ 7, 16 U.S.C. 1536	2, 5
§ 7(a)(1), 16 U.S.C. 1536(a)(1)	13
§ 7(a)(2), 16 U.S.C. 1536(a)(2)	2, 12
§ 7(b), 16 U.S.C. 1536(b)	2, 3, 10
§ 7(b)(3)(A), 16 U.S.C. 1536(b)(3)(A)	3
§ 11(a), 16 U.S.C. 1540(a)	4
§ 11(b), 16 U.S.C. 1540(b)	4
§ 11(c)(6), 16 U.S.C. 1540(e)(6)	4
§ 11(g)(1), 16 U.S.C. 1540(g)(1)	4, 6
§ 11(g)(1)(A), 16 U.S.C. 1540(g)(1)(A)	11
§ 11(g)(1)(C), 16 U.S.C. 1540(g)(1)(C)	11
Reclamation Act of 1902, 43 U.S.C. 372 <i>et seq.</i>	4
Administrative Procedure Act, 5 U.S.C. 706(2)(A) ...	13
28 U.S.C. 1331	6
28 U.S.C. 2201	6
43 U.S.C. 390uu	13
50 C.F.R.:	
Pt. 17:	
Section 17.11	2
Pt. 402	2
Section 402.01(b)	2
Section 402.13	3

V

Regulations—Continued:	Page
Section 402.14	2, 3
Section 402.15	10
Miscellaneous:	
59 Fed. Reg. 61,744 (1994)	12

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-813

BRAD BENNETT, ET AL., PETITIONERS

v.

MARVIN PLENERT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 63 F.3d 915. The order of the district court (Pet. App. 19-29) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1995.¹ The petition for a writ of certiorari was filed on November 21, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

¹ Petitioners filed a suggestion for rehearing in banc. That filing was treated by the Court of Appeals as a petition for rehearing and suggestion for rehearing en banc, and was denied on November 20, 1995. App., *infra*, 1a.

STATEMENT

1. Congress enacted the Endangered Species Act (ESA or Act) to protect and conserve endangered and threatened species. 16 U.S.C. 1531(b). To accomplish that goal, Congress directed the Secretaries of Commerce and the Interior to list threatened and endangered species and designate their critical habitats. See 16 U.S.C. 1533.² Section 7 of the ESA imposes substantive and procedural requirements upon federal agencies considering actions that might have adverse effects on listed species. 16 U.S.C. 1536. Under Section 7(a)(2), a federal agency must consult with the Secretary to ensure that any "action authorized, funded or carried out by such agency" is not likely to jeopardize the continued existence of any endangered or threatened species. 16 U.S.C. 1536(a)(2).

Section 7 and its implementing regulations prescribe a detailed consultation process to assist federal agencies in complying with the Act's substantive requirements. 16 U.S.C. 1536(b); see 50 C.F.R. Pt. 402. The agency considering an action (the "action agency") must determine in the first instance whether that action "may affect" a listed species. 50 C.F.R. 402.14. The regulations further provide that if the action agency determines that the proposed action "may affect" a listed species, it is then required to enter into formal consultation with the "consulting agency" (in this case, the FWS), unless the action

² The Secretary of the Interior and the Secretary of Commerce share responsibility for listing species and for other ESA duties. See 16 U.S.C. 1532(15). The Secretary of the Interior, who implements the ESA through the Fish and Wildlife Service (FWS), has responsibility for the endangered species of fish at issue in this case. See 50 C.F.R. 17.11, 402.01(b).

agency has concluded through preparation of a biological assessment or informal consultation that the action is not likely to adversely affect the listed species. *Ibid.*³

Following formal consultation, the consulting agency issues a "biological opinion" setting forth the agency's view as to whether the proposed action would be likely to jeopardize the continued existence of the listed species. 16 U.S.C. 1536(b); 50 C.F.R. 402.14. If the consulting agency concludes that jeopardy is likely, it must suggest any reasonable and prudent alternatives that it believes would avoid jeopardy. 16 U.S.C. 1536(b)(3)(A). While formal consultation will fulfill the action agency's procedural obligations under the Act and implementing regulations, reliance upon the consulting agency's biological opinion must be reasonable in order to satisfy the action agency's substantive obligations under the Act. *Pyramid Lake Paiute Tribe of Indians v. United States Dep't of Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990). The ultimate obligation to comply with Section 7(a)(2)'s mandate to avoid the likelihood of jeopardizing listed species rests with the action agency. 898 F.2d at 1415; see *Tribal Village of Aku-*

³ Under the regulations, the action agency's determination that a proposed action is not likely to adversely affect a listed species requires the written concurrence of the consulting agency. 50 C.F.R. 402.13. If no such concurrence is reached, the regulations provide that formal consultation will be undertaken. 50 C.F.R. 402.13, 402.14. The consulting agency, however, can only request that the action agency enter into formal consultation; it cannot order the action agency to do so. 50 C.F.R. 402.14; see *Sierra Club v. Marsh*, 816 F.2d 1376, 1386-1387 (9th Cir. 1987); cf. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569, 570 (1992) (opinion of Scalia, J.).

tan v. Hodel, 869 F.2d 1185, 1193-1194 (9th Cir. 1988), cert. denied, 493 U.S. 873 (1989); *Roosevelt Campobello Int'l Park Comm'n v. EPA* 684 F.2d 1041, 1049 (1st Cir. 1982); *National Wildlife Fed'n v. Coleman*, 529 F.2d 359, 371 (5th Cir.), cert. denied, 429 U.S. 979 (1976).

Primary responsibility for enforcement and implementation of the ESA is entrusted to officials of the federal government. See, e.g., 16 U.S.C. 1540(a), (b), and (e)(6). The Act also contains a provision for "citizen suits." That provision states that

any person may commence a civil suit on his own behalf—

(A) to enjoin any person * * * who is alleged to be in violation of any provision of [the Act] or regulation issued under the authority thereof; or

* * * * *

(C) against the Secretary [of Commerce or the Interior] where there is alleged a failure * * * to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary.

16 U.S.C. 1540(g)(1).

2. Congress authorized the creation of the Klamath Irrigation Project in 1905, pursuant to the Reclamation Act of 1902, 43 U.S.C. 372 *et seq.*, in order to irrigate otherwise arid land. Administered by the Bureau of Reclamation (Bureau), which is located within the Department of the Interior, the Project is composed of lakes, rivers, dams, and irrigation canals in southern Oregon and northern California. Project water is stored primarily in Upper

Klamath Lake and in other reservoirs, including the Clear Lake and Gerber Reservoirs. In February 1992, the Bureau of Reclamation completed a biological assessment of the effects of the long-term operation of the Klamath Project on listed species and forwarded that assessment to the FWS. The Bureau determined, *inter alia*, that the Project's operation might affect two endangered species, the Lost River sucker and the shortnose sucker. The Bureau therefore requested formal consultation with the FWS pursuant to Section 7 of the ESA, 16 U.S.C. 1536. Pet. App. 3; Gov't C.A. Br. 7-9.

As a result of the consultation, the FWS issued a biological opinion concerning the effects of the proposed long-term operation of the Klamath Project. The FWS concluded that the "long-term operation of the Klamath Project was likely to jeopardize the continued existence of the Lost River and shortnose suckers." Pet. App. 3. The FWS recommended reasonable and prudent alternatives to avoid jeopardy to the endangered fish, which included the imposition of minimum water levels for the Upper Klamath Lake and the Clear Lake and Gerber Reservoirs. *Ibid.* The Bureau notified the FWS that it intended to adopt the FWS's recommendations. *Ibid.*

3. Petitioners are two individual ranch operators and two irrigation districts in the State of Oregon. They receive reservoir water from the Klamath Project. Petitioners filed the present suit for declaratory and injunctive relief, seeking to compel the FWS to withdraw portions of its biological opinion. Pet. App. 31-44. Petitioners named as defendants two FWS officials and the Secretary of the Interior. *Id.* at 31-32. Neither the Bureau nor any of its officials was named as a defendant, and the Secretary was identi-

fied only as the official "empowered by the ESA to make jeopardy determinations concerning threatened and endangered species." *Id.* at 35.

Petitioners asserted jurisdiction under the citizen suit provision of the ESA, 16 U.S.C. 1540(g)(1), and the federal question and declaratory judgment provisions of the Judicial Code, 28 U.S.C. 1331 and 28 U.S.C. 2201. Pet. App. 33. The complaint alleged that the defendants (respondents in this Court) had violated the ESA and its implementing regulations by (1) "improperly concluding on page 2 of the Biological Opinion that the [Bureau's] continued operation of the Klamath Project * * * is likely to jeopardize the continued existence of the Lost River and shortnose suckers," Pet. App. 40-41; (2) "improperly imposing restrictions on the withdrawal of irrigation water from Clear Lake and Gerber reservoirs," *id.* at 41; and (3) "implicitly determining critical habitat for the Lost River suckers and the shortnose suckers in Clear Lake and Gerber reservoirs * * * without considering the economic impact of that determination," *id.* at 42.

4. The district court granted the government's motion to dismiss the complaint. Pet. App. 19-29. The court observed that "the Secretary's biological opinion is advisory in nature and does not compel compliance with its recommendations or require agencies to act or refrain from acting in any particular manner." *Id.* at 24. The court concluded that petitioners' interest in utilizing Klamath Project water for their own purposes "conflict[ed] with the Lost River and shortnose suckers' interest in using the water for habitat," and that petitioners "do not have standing under ESA based on an interest which conflicts with the interests sought to be protected by the Act." *Id.*

at 27. The district court also concluded that the challenged biological opinion did not constitute a *de facto* determination of critical habitat for the endangered suckers. *Id.* at 28 n.4.

5. The court of appeals affirmed. Pet. App. 1-18. The court framed the question before it as "whether [petitioners'] action is precluded by the zone of interests test"—*i.e.*, the usual requirement that a plaintiff challenging administrative agency action "must show that 'the interest sought to be protected by [the plaintiff was] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Id.* at 4-5 (quoting *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970)) (brackets in court of appeals opinion). The court of appeals stated that this Court's decision in *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388 (1987), had made clear that "some form of the zone test applies even in cases which are not brought under the Administrative Procedure Act[, 5 U.S.C. 701 *et seq.*]." Pet. App. 6. The court then determined that a zone of interests test applies to suits brought under the ESA's citizen suit provision, *id.* at 6-11, and that "only plaintiffs who allege an interest in the preservation of endangered species fall within the zone of interests protected by the ESA," *id.* at 11. The court observed that petitioners' complaint "belies any assumption that they seek compliance with the statute in order to further the goal of species preservation." *Id.* at 16. Rather, the court continued, petitioners "claim a competing interest—an interest in using the very water that the government believes is necessary for the preservation of the species." *Ibid.* Accordingly, the court held that petitioners

lack standing to bring their claims under the ESA, *id.* at 17, and it affirmed the district court's dismissal of the complaint, *id.* at 18.

ARGUMENT

The court of appeals correctly concluded that petitioners' claims were not cognizable under the citizen suit provision of the Endangered Species Act. Further review is not warranted.

1. Petitioners contend (Pet. 11-16) that this Court should grant certiorari in order to resolve a conflict between the decision below and the Eighth Circuit's ruling in *Defenders of Wildlife v. Hodel*, 851 F.2d 1035, 1039 (1988), opinion after remand, 911 F.2d 117 (1990), rev'd on other grounds, 504 U.S. 555 (1992). In *Defenders of Wildlife*, the Eighth Circuit stated that

[u]nlike the constitutional [standing] requirements, Congress may eliminate the prudential limitations by legislation. * * * In this case, the ESA provides that "any person" may commence a suit to enjoin any person who is alleged to be in violation of the ESA. See 16 U.S.C. § 1540(g). Environmental associations are "persons" and may bring suit in their own name. *Id.* at § 1532(13). Defenders therefore need meet only the constitutional requirements for standing for their claims under the ESA.

851 F.2d at 1039. Immediately thereafter, however, the Eighth Circuit explained that the plaintiffs in that case satisfied the standing requirements of the Administrative Procedure Act because their "interest in preserving endangered species is directly within the zone of interests of the ESA." *Id.* at 1039

n.2.⁴ In short, petitioners identify no decision permitting invocation of the ESA's citizen suit provision by plaintiffs who did not assert an interest in the preservation of listed species.⁵ The question whether a "zone of interests" analysis applies to the ESA therefore does not warrant this Court's review.

2. Even if that question did merit review by this Court, the present case would not be a suitable vehicle for its consideration.

a. Even if the ESA's citizen suit provision were intended to eliminate all prudential limitations on standing with respect to all potential plaintiffs, petitioners would not be entitled to adjudication of their present claims because they lack standing under Article III. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), this Court reviewed the principles governing standing to sue in the context of an ESA case. The Court reiterated that at an "irreducible constitutional minimum," plaintiffs must establish (1) that they have suffered an "injury in fact"—an "invasion of a legally-protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical," *id.* at 560

⁴ The court of appeals went on to conclude that the plaintiffs satisfied the standing requirements of Article III. 851 F.2d at 1039-1044. That determination was subsequently rejected by this Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

⁵ The District of Columbia Circuit, like the court of appeals in the instant case, has applied a zone of interests analysis in resolving standing questions under the ESA. See *Idaho By and Through Idaho Public Utilities Comm'n v. ICC*, 35 F.3d 585, 592 (D.C. Cir. 1994); *Humane Soc'y v. Hodel*, 840 F.2d 45, 60-61 (D.C. Cir. 1988); *National Audubon Soc'y v. Hester*, 801 F.2d 405, 407 (D.C. Cir. 1986).

(citations and quotations omitted); (2) that their injury is fairly traceable to the challenged action of the defendant, and not the result of the "independent action of some third party not before the court," *ibid.* (quoting *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)); and (3) that their injury is "likely" to be "redressed by a favorable decision," 504 U.S. at 561 (quoting *Simon*, 426 U.S. at 38). In the present case, petitioners allege an injury (reduction in the volume of Klamath Project water available to them) that cannot be fairly traced to the FWS's biological opinion and that is not likely to be redressed by a decision in their favor.

The biological opinion at issue in this case sets forth the FWS's views as to the likely effects on listed species of the Klamath Project's continued operation. See 16 U.S.C. 1536(b). The FWS, however, does not determine whether a project or other action will proceed. Rather, the choice of whether and in what manner to go forward rests with the action agency. 50 C.F.R. 402.15. In the present case, the Bureau of Reclamation retained the legal authority to adopt or reject, in whole or in part, the recommendations set forth in the biological opinion. It is the Bureau's ultimate decisions regarding the allocation of Klamath Project water that are subject to judicial review, and a reviewing court may examine the biological opinion only in evaluating the reasonableness and legality of those decisions. See, *e.g.*, *Pyramid Lake*, 898 F.2d at 1415-1416 (stating that the "FWS's actions, or lack thereof, in preparing its opinions are relevant on appeal only to the extent that they demonstrate whether the [action agency's] reliance on the reports is 'arbitrary and capricious'" (citation omitted)).

Petitioners, however, have challenged the FWS's biological opinion rather than the Bureau's decision to impose restrictions on their use of Klamath Project water. Petitioners' alleged injury is traceable not to the FWS's issuance of the biological opinion, but to the Bureau's decision regarding the allocation of Project water. That injury also would not be redressable by a favorable judicial decision, since the Bureau would remain free to impose the same restrictions on water allocation (whether based on ESA concerns or on other factors) even if the FWS's biological opinion were held to be erroneous. Because petitioners' alleged injury results from "the independent action of some third party not before the court," they have failed to satisfy the constitutional requirements for standing. *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41 (1976); see *Defenders of Wildlife*, 504 U.S. at 568-571 (opinion of Scalia, J.); *Allen v. Wright*, 468 U.S. 737, 751 (1984).

b. Even if petitioners' alleged injury were traceable to the FWS's biological opinion, their claims would not be cognizable under the citizen suit provision of the Endangered Species Act. As relevant here, that provision authorizes private suits "to enjoin any person * * * who is alleged to be in violation of any provision of [the Act] or regulation issued under the authority thereof," 16 U.S.C. 1540(g)(1)(A), and suits "against the Secretary [of Commerce or the Interior] where there is alleged a failure * * * to perform any act or duty under [16 U.S.C. 1533] which is not discretionary with the Secretary," 16 U.S.C. 1540(g)(1)(C). See page 4, *supra*. That provision is inapplicable here, since issuance of a flawed biological opinion would not place FWS or the Secretary "in

violation of" the ESA, nor would it constitute a breach of a non-discretionary duty.⁶

c. Finally, petitioners' action would not have been cognizable under the ESA's citizen suit provision even if it had been brought against the Bureau of Reclamation. The gravamen of petitioners' claim is that the restrictions on Project lake levels suggested by the FWS and adopted by the Bureau were greater than necessary to avoid jeopardy to the listed species. Proof of that allegation would not establish a violation of the ESA. Section 7(a)(2) of the Act requires each action agency to "insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction of [critical] habitat of such species." 16 U.S.C. 1536(a)(2). Nothing in the ESA, however, requires federal agencies to permit the use of natural resources up to the point at which such use is likely

⁶ There is, in particular, no basis for petitioners' contention that the Secretary violated 16 U.S.C. 1533(b)(2) and its implementing regulations by "implicitly determining critical habitat for the Lost River suckers and the shortnose suckers * * * without considering the economic impact of that determination." Pet. App. 42; see Pet. 27. Critical habitat may be designated only through notice and comment rulemaking under Section 4(a)(3) of the ESA, 16 U.S.C. 1533(a)(3). (Pursuant to Section 4 of the ESA, the Secretary of the Interior has proposed a rule designating critical habitat for the endangered Lost River sucker and shortnose sucker. See 59 Fed. Reg. 61,744 (1994).) The requirement that the Secretary "tak[e] into consideration the economic impact * * * of specifying any area as critical habitat," 16 U.S.C. 1533(b)(2), applies only to the official designation of critical habitat pursuant to Section 4(a)(3). There is no such thing as an "implicit" designation of critical habitat under the ESA.

to jeopardize the continued existence of a listed species. The Bureau's imposition of restrictions on water allocation that are unnecessary to avoid jeopardy would not violate the ESA. See 16 U.S.C. 1536(a)(1).

This is not to say that a federal agency's over-protection of listed species could never be the subject of a valid legal challenge. Petitioners might have sought judicial review of the Bureau's water allocation decisions under the Administrative Procedure Act by alleging that the Bureau's refusal to release additional water was arbitrary and capricious. See 5 U.S.C. 706(2)(A). Alternatively, petitioners might have contended that some *other* provision of law required the Bureau to allocate additional water.⁷ 43 U.S.C. 390uu; cf. *Nebraska v. Wyoming*, 115 S. Ct. 1933, 1942, 1944-1945 (1995) (recognizing that challenges to operation of reclamation projects may be brought in federal district court). In either of those contexts, the reasonableness of the Bureau's belief that the restrictions it had imposed were required by or appropriate under the ESA might ultimately have been germane to the court's resolution of petitioners' legal claim.⁸ Those claims would not have arisen

⁷ The complaint in this case alleged that petitioners receive water from the reservoirs in question, see Pet. App. 33-34, and further alleged that "[t]he restrictions on lake levels imposed in the Biological Opinion adversely affect plaintiffs by substantially reducing the quantity of available irrigation water," *id.* at 40. The complaint did not allege, however, that petitioners possessed any legal entitlement to the water in question; and the petition does not contend that the Bureau's refusal to release the water violated any law other than the ESA.

⁸ There is consequently no merit to petitioners' assertion (Pet. 16) that the decision of the court of appeals bars a

under (or alleged violations of) the ESA, however, and they consequently could not be brought pursuant to the ESA's citizen suit provision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1996

potential plaintiff "unlucky enough to be dependent upon a federal project which makes use of a resource determined to be necessary for an endangered species" from challenging "any determination regarding disposition of the resource, even if the disposition is incompatible with the requirements of law." Nothing in the court of appeals' decision precludes petitioners or other similarly situated parties from asserting a legal challenge to the Bureau's allocation of Klamath Project water.

APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 94-35008

D.C. No. 94-35008

BRAD BENNETT, ET AL. PLAINTIFF-APPELLANTS,

v.

MARVIN L. PLENERT,
 IN HIS OFFICIAL CAPACITY AS
 REGIONAL DIRECTOR, REGION ONE,
 FISH AND WILDLIFE SERVICE,
 U.S. DEPARTMENT OF THE INTERIOR, ET AL.,
 DEFENDANT-APPELLEES

[FILED NOV. 20, 1995]

ORDER

BEFORE: Pregerson, Canby, and Reinhardt, Circuit Judges:

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

(1a)

7
No. 95-813

Supreme Court, U.S.

FILED

MAR 1 1996

CLERK

In The
Supreme Court of the United States
October Term, 1995

BRAD BENNETT, et al.

Petitioners,

vs.

MARVIN PLENERT, et al.

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
REVIEW BY THIS COURT IS APPROPRIATE TO RESOLVE THE CHAOTIC APPLICATION OF STANDING PRINCIPLES TO ENDANGERED SPE- CIES ACT LITIGATION	2
ARTICLE III STANDING REQUIREMENTS ARE SATISFIED BY THE PETITIONERS IN THE PRE- SENT CASE.....	4
RESPONDENTS' VIOLATIONS OF THE ESA ARE SUFFICIENTLY ALLEGED IN THE COMPLAINT	7
RESPONDENTS ARE ENTITLED TO NO IMMUNITY FROM SUIT FOR OVER-REGULATING IN THE NAME OF SPECIES PROTECTION	9
CONCLUSION	9

TABLE OF AUTHORITIES

Page

CASES:

<i>Babbitt v. Sweet Home Chapter of Communities</i> , 515 U.S. ___, 132 L.Ed.2d 597, 115 S.Ct. 2407 (1995)	1
<i>California Transport v. Trucking Unlimited</i> , 404 U.S. 508, 30 L.Ed.2d 642, 92 S.Ct. 609 (1972)	8
<i>Catron County Board of Commissioners v. United States Fish and Wildlife Service</i> , ___ F.3d ___, 1996 U.S.App. Lexis 1479 (filed Feb. 2, 1996)	3
<i>Defenders of Wildlife v. Hodel</i> , 851 F.2d 1035 (1988)	2
<i>Idaho Farm Bureau Federation v. Babbitt</i> , 900 F.Supp. 1347 (D. Idaho 1995)	2
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. ___, 119 L.Ed.2d 351, 112 S.Ct. 2130 (1992)	5
<i>Mausolf v. Babbitt</i> , ___ F.Supp. ___, 1996 U.S. Dist. Lexis 1020	2, 3, 9
<i>National Organization of Women v. Scheidler</i> , 510 U.S. ___, 127 L.Ed.2d, 99, 114 S.Ct. 798 (1994)	5
<i>Romero-Barcelo v. Brown</i> , 643 F.2d 835 (1st Cir. 1981)	8
<i>Scheuer v. Rhodes</i> , 416 U.S. 232, 40 L.Ed.2d 90, 94 S.Ct. 1683 (1974)	8
<i>Tribal Village of Akutan v. Hodel</i> , 869 F.2d 1185 (9th Cir. 1988)	6
<i>Westlands Water Dist. v. U.S. Dept. of Interior</i> , 850 F.Supp. 1388 (E.D. Cal. 1994)	7

CONSTITUTION:

Article III	1, 4, 5, 7
-------------------	------------

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

Endangered Species Act

16 U.S.C. § 1536(b)(4)	7
16 U.S.C. § 1540(a)(b)	7
16 U.S.C. § 1540(g)(1)	2
16 U.S.C. § 1540(g)(1)(A)	8
Section 7(a)(2)	5, 8
Section 11(g)(1)(A)	8
Section 4	9
50 C.F.R. § 402.15(b)	6
50 C.F.R. § 402.15(c)	6
50 C.F.R. §§ 402.14(i)(1)(iv), 402 (i)(5)	7

INTRODUCTION

The Brief in Opposition never disputes petitioners' assertion that the zone of interest questions raised by the Petition for Writ of Certiorari present important issues of federal law that should be decided by the Court. Indeed, the Brief in Opposition is notable for its complete failure to either defend the merits of the Ninth Circuit's prudential standing ruling or address the questions raised by the Petition.

Rather than confronting the issues which the Petition brings to this Court, the Brief in Opposition, instead, raises (1) an argument regarding Article III standing never decided by the courts below; (2) an issue of over regulation in the name of species preservation never presented to the courts below; and (3) a claim of circuit court uniformity on prudential standing expressly contradicted by the Ninth Circuit opinion below. In doing so, respondents never come to grips with the fact that, as recently as last term, this Court reached the merits of the controversy in a case brought under the ESA by "small landowners, logging companies and families dependent upon the forest products industries" who asserted *economic interests* under the ESA, not an interest in the preservation of endangered species. (*Babbitt v. Sweet Home Chapter of Communities*, 515 U.S. ___, 132 L.Ed.2d 597, 608, 115 S.Ct. 2407 (1995))

For the reasons which follow, the Petition for Writ of Certiorari should be granted.

**REVIEW BY THIS COURT IS APPROPRIATE TO
RESOLVE THE CHAOTIC APPLICATION OF
STANDING PRINCIPLES TO ENDANGERED
SPECIES ACT LITIGATION**

The Government's assertion that there is no conflict among the circuits regarding standing under the citizen suit provision of the Endangered Species Act (16 U.S.C. § 1540(g)(1)) is not well founded. (Br. in Opp. pp. 8-9) *Inter alia*, the Ninth Circuit, itself, recognized in the present case that:

"There is a division in the circuits as to whether the zone of interests test applies to ESA suits . . . [T]he Eighth Circuit has concluded that ESA's citizen-suit provision necessarily abrogated any zone of interests test." (App. to Pet., p. 8 fn. 3)

Reference to the Eighth Circuit's Opinion in *Defenders of Wildlife v. Hodel*, 851 F.2d 1035 (1988), opinion after removal, 911 F.2d 117 (1990), rev'd on other grounds, 504 U.S. 55 (1992) discloses that no prudential standing requirement was found to apply to litigation commenced under the citizen suit provision of the ESA – a conclusion precisely the opposite of that reached by the Ninth Circuit in the case at bench.

Nor does the split between the Eighth and Ninth Circuits show signs of abating. While district courts within the Ninth Circuit are now applying the test developed in the present case to repel challenges to alleged "over-regulation" under the ESA (see e.g. *Idaho Farm Bureau Federation v. Babbitt* 900 F.Supp. 1347, 1360 (D. Idaho 1995)) courts within the Eighth Circuit have rejected the test (see e.g. *Mausolf v. Babbitt* ___ F.Supp.

___ 1996 U.S. Dist. Lexis 1020 (App. 15, fn. 11)) and excoriated the rationale offered by the Government to support it. In *Mausolf, supra*, for example, the District court for the District of Minnesota very recently stated:

"Defendants [*Babbitt et al.*] contend, however, that plaintiffs' stated harm is not cognizable under the ESA and APA. The Court notes with interest that counsel for defendants could not identify a single potential plaintiff who would have standing to complain if the government took steps to overprotect listed species. The Court is unwilling to adopt the view that the FWS is unrestrained if it cloaks any of its acts in the laudable robe of endangered and threatened species protection. This is a form of totalitarian virtue – a concept for which no precedent has been advanced and which is foreign to the rule of law." (see App. 19)

Meanwhile, in *Catron County Board of Commissioners v. United States Fish and Wildlife Service*, ___ F.3d ___, 1996 U.S. App. Lexis 1479 (filed Feb. 2, 1996) the Tenth Circuit declined to require allegations of an interest in the preservation of endangered species as a prerequisite to prudential standing under the ESA. Instead, the Court found that the "proprietary and procedural interests" of a local governmental entity contesting a designation of critical habitat fell within any "zone of interests protected by the ESA." (1996 U.S. Lexis 1479, p. 4) Thus, the risk of flood damage to county-owned property resulting from a critical habitat designation that prevented the diversion and impoundment of water was enough, in the Tenth Circuit's view, to satisfy the test. (*Id.*)

In short, there is *no* consistency among the circuits regarding the applicability – or application – of prudential standing requirements to actions brought under the ESA. Rather than being determined by commonly applied legal principles, a plaintiff's success or failure in surviving a prudential standing challenge is now simply a product of fortuitous venue.

◆

**ARTICLE III STANDING REQUIREMENTS ARE
SATISFIED BY THE PETITIONERS
IN THE PRESENT CASE**

In an apparent attempt to deflect the Court's attention from the zone of interest issues raised by the Petition, respondents assert an argument regarding Article III standing that was never decided by either the district court (see App. to Pet., p. 27) or the Ninth Circuit. Indeed, the Ninth Circuit did *not* perceive Article III standing to be the issue before it:

"The issue before us is not whether the plaintiffs have satisfied the constitutional standing requirements but whether their action is precluded by the zone of interests test, the prudential standing limitation." (App. to Pet., pp. 4-5)

This Court obviously cannot resolve issues never considered or decided by the courts below. Nor should it attempt to do so. The appropriate mechanism for dealing with the Article III issue raised by respondents is for respondents to raise their contention in the courts below, if this Court grants the Petition for Writ of Certiorari and

reverses the Ninth Circuit's holding on the zone of interest issue. This is particularly so given the weakness which pervades respondents' Article III contentions.

Since this case was disposed of at the pleading stage on a motion to dismiss, the burden of establishing constitutional standing is a modest one. (See *National Organization of Women v. Scheidler*, 510 U.S. ____ 127 L.Ed.2d, 99, 197, 114 S.Ct. 798, 803 (1994); *Lujan v. Defenders of Wildlife*, 504 U.S. ____ 119 L.Ed.2d 351, 364 112 S.Ct. 2130 (1992)). Here, that burden has been more than adequately carried.

Reduced to the essentials, respondents' argument regarding Article III standing is that Petitioners' injury is not "fairly traceable to the challenged action"; but, instead, is the result of the "independent action of some third party not before the Court." (Br. in Opp., p. 10) In other words, respondents are trying to pretend there is no connection between the biological opinion issued by the Fish and Wildlife Service ("FWS") and the re-operation of the Klamath Project by the Bureau of Reclamation ("Bureau") – even though that re-operation is in accordance with the precise terms of the biological opinion. The argument is grounded on the assumption that the Bureau is free to ignore the reasonable and prudent alternatives suggested by the FWS. (Br. in Opp., p. 10) This assumption, however, attempts to treat the biological opinion as a meaningless piece of paper and is fundamentally incompatible with the provisions of the ESA and its implementing regulations.

The basic, substantive obligations of federal agencies under the ESA are created by Section 7(a)(2) of the Act which provides, in relevant part:

"Each federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical, unless such agency has been granted an exemption for such action. . . . In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available."

To this end, regulations adopted by the Secretary to implement the ESA require that once a biological opinion is issued, the Bureau must determine whether and in what manner to proceed in light of the opinion and to notify the FWS of its final decision regarding the proposed action. (50 C.F.R. § 402.15(b)) If the Bureau determines that it cannot comply with the reasonable and prudent alternative developed by the FWS, the Bureau's recourse – apart from not operating the project at all – is to seek an exemption, not to ignore the biological opinion. (50 C.F.R. § 402.15(c))

While the Bureau (or the Secretary) may depart from a biological opinion, it may do so only if "alternative, reasonably adequate steps to insure the continued existence of any threatened or endangered species" are adopted. (*Tribal Village of Akutan v. Hodel*, 869 F.2d 1185, 1193 (9th Cir. 1988)) Furthermore, if the Secretary (or Bureau) deviates from the biological opinion, he does so "subject to the risk that he has not satisfied the standard of Section 7(a)(2)." (*Tribal Village of Akutan v. Hodel*, *supra*;

Westlands Water Dist. v. U.S. Dept. of Interior, 850 F.Supp. 1388, 1421 (E.D. Cal. 1994))

Considering the substantial civil and criminal penalties which Congress has provided for non-compliance (16 U.S.C. § 1540(a), (b)), deviation from a biological opinion is not simply a matter of bureaucratic whim. Indeed where, as here, a biological opinion includes a statement authorizing the take of species incidental to the operation of the project, the authorization – and related immunity from civil or criminal liability – is valid only if there is compliance with the reasonable and prudent alternatives and measures prescribed by the FWS. (see 16 U.S.C. § 1536(b)(4); 50 C.F.R. §§ 402.14(i)(1)(iv), 402.14(i)(5)) Hence, in order to avoid potential criminal liability for an illegal "take" of endangered species, the Bureau *had* to modify its operation of the Klamath Project to conform to the biological opinion. In these circumstances, it ignores reality to suggest that the biological opinion had no discernable impact on Klamath Project operations and that the causation and redressability elements of Article III standing are lacking.

RESPONDENTS' VIOLATIONS OF THE ESA ARE SUFFICIENTLY ALLEGED IN THE COMPLAINT

Respondents also argue that they are not subject to the citizen suit provision of the ESA, "since issuance of a flawed biological opinion would not place FWS or the Secretary 'in violation of' the ESA, nor would it constitute a breach of a non-discretionary duty." (Br. in Opp., pp. 11-12) In addition, they contend there is "no basis"

for petitioners' allegation that the Secretary violated Section 4 of the ESA by designating critical habitat without considering the economic impact of the determination. (*Id.*, p. 12 fn. 6) Neither argument supports denial of the Petition for Writ of Certiorari.

The contention that issuance of a flawed biological opinion can never be actionable under the citizen suit provision of the ESA defies logic. If an opinion is "flawed" because it was developed in violation of one or more of the provisions of the Act – such as the requirement in Section 7(a)(2) to use "the best scientific and commercial data available" – it is enjoined under Section 11(g)(1)(A). (16 U.S.C. § 1540(g)(1)(A)). Indeed, the consequence of respondents' "unreviewability" argument is that the FWS could violate *all* of the methodological requirements that Congress has imposed for preparation of biological opinions and designation of critical habitat and such noncompliance would be unreviewable under the ESA. However, the courts have long held that the adequacy of a biological opinion may be challenged, both in terms of its factual basis and its recommendations. (See e.g., *Romero-Barcelo v. Brown* 642 F.2d 835, 858 (1st Cir. 1981))

Moreover, in the procedural context of this case, respondents are in no position to debate the "basis" of petitioners' allegations of ESA violations by the FWS. Because respondents elected to proceed by way of motion to dismiss, the allegations of the Complaint are to be taken as true. (*Scheuer v. Rhodes*, 416 U.S. 232, 236, 40 L.Ed.2d 90, 96, 94 S.Ct. 1683 (1974); *California Transport v. Trucking Unlimited*, 404 U.S. 508, 515, 30 L.Ed.2d 642, 649, 92 S.Ct. 609 (1972)) Here, those allegations include the claim that respondents violated Section 4 of the ESA by

implicitly designating critical habitat without considering the economic impact of doing so. (App. to Pet., p. 42)

◆

RESPONDENTS ARE ENTITLED TO NO IMMUNITY FROM SUIT FOR OVER-REGULATING IN THE NAME OF SPECIES PROTECTION

Finally, respondents raise the same argument rejected earlier this year by the District Court for the District of Minnesota in *Mausolf v. Babbitt*, *supra* (App. 19-20); viz; that they cannot be sued under the ESA for over-regulating in the name of species protection. (Br. in App., p. 12-14) As was true in *Mausolf*, this assertion of virtuous totalitarianism (App. 19) is unaccompanied by the citation of supportive authority. For the reasons set forth in *Mausolf*, it should be rejected as a concept foreign to the rule of law. (App. 19) Simply put, the FWS – like everyone else – is required to operate within the parameters of the ESA.

◆

CONCLUSION

In trying to discourage the Court from reviewing the prudential standing issues raised in this case, respondents end up arguing for an extremely restrictive scope of judicial review under the ESA: biological opinions are effectively unreviewable; overregulation claims are not cognizable; and the FWS can never be accused of implicitly designating critical habitat in violation of the requirements of Section 4 of the Act.

Not only is the Government going further and further in attempting to make ESA actions unreviewable, but it has also made no attempt to defend the *merits* of the Ninth Circuit's prudential standing ruling. The Ninth Circuit decided this case solely on prudential standing grounds. That decision squarely conflicts with the decisions of other circuits. Because this case was decided on a motion to dismiss, where the factual allegations of the complaint are deemed to be true, the prudential standing issues are clearly presented. Now is the time – and this is the case – to resolve these important questions of federal law.

The Petition for a Writ of Certiorari should be granted.

DATED: March 4, 1996

Respectfully submitted,
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UNITED STATES DISTRICT COURT
 DISTRICT OF MINNESOTA
 FIFTH DIVISION
 5-94-cv-8

Jeffrey Mausolf; William Kullberg;)	
Arlys Strehlo; and Minnesota)	
United Snowmobilers Association)	
)	
v.	)	ORDER
Bruce Babbitt, Secretary,)	
Department of Interior; Roger)	
Kennedy, Director, National Park)	
Service; Mollie Beattie, Director,)	
U.S. Fish and Wildlife Service;)	
and Ben Clary, Superintendent,)	
Voyageurs National Park)	

In December, 1992, the National Park Service ("NPS" or "Park Service") closed certain lakeshore areas in Voyageurs National Park ("Voyageurs" or "Park") to snowmobiles and motor vehicles. The closed areas are home to gray wolves and bald eagles, each of which is protected under the Endangered Species Act ("ESA" or "Act").¹ The Park Service's closure was imposed without notice or public consideration, ostensibly to prevent the possible taking of individual wolves and bald eagles and to protect the species' population and habitat.²

¹ The parties do not dispute the validity of the lakeshore closures during the bald eagles' breeding period. *See infra*.

² All parties agree the Park's populations of gray wolves and bald eagles are stable. The parties also agree, however, that the Park's bald eagle population is reproducing at lower rates than bald eagle populations in surrounding areas. *See infra*.

Plaintiffs are snowmobilers who claim the lakeshore closures violated the ESA and the Administrative Procedure Act ("APA"). They seek declaratory and injunctive relief. Defendants, in turn, deny that plaintiffs have standing to make their claim; asserts the closures were neither arbitrary nor capricious; and deny the NPS was required to initiate or participate in any rulemaking procedures before closing the areas to snowmobilers. Each party has submitted briefs and argued before the Court seeking summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure ("Fed. R. Civ. P."). The parties agree there are no disputed facts and this case raises purely legal issues that can be resolved on these motions.

I. Background

A. The Endangered Species Act

In 1973, Congress enacted the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, to protect America's endangered and threatened wildlife. Section 9 of the Act makes it unlawful for any person to "take" any species listed as endangered or threatened. 16 U.S.C. § 1538(1)(B)-(D). "Take" is statutorily defined to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engaged in any such conduct." 16 U.S.C. § 1532(19). Federal regulations define "harassment" as any act "which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering." 50 C.F.R. § 17.3. The regulations define "harm" as "an act which

actually kills or injures wildlife," and provide that "[s]uch act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." *Id.*

Section 7 of the ESA prohibits federal agencies from taking any action "likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary [of the Interior] . . . to be critical." 16 U.S.C. § 1536(a)(2). Federal agencies must formally consult the United States Fish and Wildlife Service ("FWS" or "Fish and Wildlife") concerning any prospective agency action that may affect listed species or their critical habitat. 16 U.S.C. § 1536(a)(3). After consultation, the FWS issues a biological opinion and determines whether the particular action is likely to jeopardize a species or adversely modify its critical habitat. 16 U.S.C. § 1526(b)(3)(A). Federal regulations require that the biological opinion be formulated using "the best scientific and commercial data available." 50 C.F.R. § 402.14(g)(8).

At section 10, the ESA authorizes the Secretary of the Interior ("Secretary") to issue permits allowing any taking, which section 9 would otherwise prohibit, "if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. § 1539(a)(1)(B). To issue such a permit, the FWS must provide an "incidental take" statement specifying the take's impact on the species and identifying "those reasonable and prudent measures . . . necessary or appropriate to minimize such impact." 16 U.S.C. § 1536(b)(4).

B. Voyageurs National Park

Congress authorized the creation of Voyageurs National Park in 1971 and established it in 1975. Pub. L. No. 91-661. The Park is a northern Minnesota forest area, adjacent to the Canadian border. Glaciers have shaped the land to produce a system of internal waterways. The Park covers nearly 220,000 acres, of which 85,506 (39 percent) are water. The Kabetogama Peninsula accounts for almost half of the Park's land area.

Prior to the Park's establishment, its land was freely logged, mined, and used for recreation. In establishing the Park, Congress sought "to preserve for the inspiration and enjoyment of present and future generations, the outstanding scenery, geological conditions, and waterway system which constituted a part of the historic route of the Voyageurs who contributed significantly to the opening of the Northwestern United States." 16 U.S.C. § 160.

C. Bald Eagles

The bald eagle is classified under the ESA as a threatened species in Minnesota. Between 13 and 21 breeding eagle pairs have occupied Voyageurs since annual surveys began in 1973. U.S. Fish & Wildlife Service, *Administrative Record for the Voyageurs National Park Wilderness Plan Consultation*, Tab 13, at 8 [hereinafter *Admin. Rec.*]. Although the Park's bald eagle population is presently stable, its reproductive success has been below replacement. The Park's eagles reproduce at lower rates than do eagles in the adjacent Superior and Chippewa National Forests. *Admin. Rec.*, Tab 46.

The causes of these low reproductive rates are unknown. Many theories have been posited, but none is recognized as the "cause" by wildlife experts. Among the possibilities is human disturbance during the breeding cycle, which may cause eagles to metabolize fat reserves containing polychlorobiphenyl ("PCB") and mercury. According to this theory, such metabolism increases contaminant levels in eagle eggs.³ *Id.*, Tab 46, at 12.

Bald eagles return to Voyageurs in late February. Upon their arrival, eagles scavenge on fish and wolf kill remains until the ice melt in late April or early May. Under the PCB metabolism theory, the critical disturbance period of bald eagles extends from courtship in late February through incubation in mid-May. *Id.*, Tab 29, at 14-15. As a result, the plaintiffs do not dispute the validity of temporary closures of trails within a quarter mile of bald eagle nests during the eagles' breeding season, but do challenge the validity of permanent closures of such trails outside the breeding period.

D. Gray Wolves

The gray wolf is also classified as threatened in Minnesota. Northeastern Minnesota contains one of the United States' most significant gray wolf populations. The best estimates count between 1,200 and 1,400 wolves in Minnesota. Wildlife experts recognize that the gray wolf's numbers are slowly increasing and their range is

³ Other possible factors include decreased fishery productivity and environmental contamination, such as toxic chemicals in the food chain. *Admin. Rec.*, Tab 46, at 12.

expanding. *Id.*, Tab 29, at 16. Voyageurs maintains an average population of 35 individual wolves with an annual survival rate of 85 percent. These wolves comprise between 6 and 9 wolf packs, with 2 to 11 wolves per pack. Only half of Voyageurs' identified packs have territories completely within the Park.

Frozen surfaces of major lakes are important hunting areas for Voyageurs wolves. This is especially true during light-snow winters; during periods of heavy snow, wolves make most kills in wooded areas. *Id.*, Tab 15. It is recognized that snowmobiles can cause temporary dispersal of wolves. As a result, the Park Service has groomed and marked trails on lake surfaces to channel snowmobilers away from the shoreline, thereby preventing disruption of wolves feeding on kills. *Id.*, Tab 19, at 11. Beyond this temporary dispersal, snowmobiles seem to pose no other threat to wolves.

An estimated 80 percent of wolf mortality within Minnesota is caused by humans. This includes animals shot, hit by cars, or snared and killed by trappers. Wolf packs having territories extending outside the Park, and wolves that venture beyond its borders, are especially vulnerable to human-caused mortality.⁴ *Id.*, Tab 29, at 16. Wolves within the Park, which have adapted their behavior to human recreational activities such as snowmobiling, cross-country skiing, ice fishing, and motor vehicle use, are not as vulnerable to human-caused mortality as those beyond the Park's borders. *Id.*

⁴ Wolves venturing across the border into Ontario, Canada, may be taken legally.

E. Snowmobiles and Voyageurs National Park

The Voyageurs National Park Act recognized the land's historic recreational use by providing that "[t]he Secretary may, when planning development of the park, including appropriate provisions for (1) winter sports, including the use of snowmobiles." 16 U.S.C. § 160h. This express authorization of snowmobiling in Voyageurs is unique to the Park's enabling legislation.⁵ Partly based on this authority, snowmobile use remained unregulated until well after the Park was established, pending assessment of snowmobiling's affect on wildlife.

1. 1991 Regulations

The NPS issued its first Voyageurs snowmobiling regulations in January, 1991. See 36 C.F.R. § 7.33 (b) (1991). These regulations expressly allowed snowmobiling on virtually all of the Park's frozen lake surfaces. *Id.* They also authorized the Park Superintendent to temporarily close trails or lake surfaces, after "taking into consideration public safety, wildlife management, weather, and park management objectives." *Id.* § 7.33(b)(3).

The Park Service promulgated the 1991 regulations after determining that snowmobiling was generally insignificant in its impact on wildlife. This determination was

⁵ By contrast, the Boundary Waters Canoe Area Wilderness Act of 1978, which established Voyageurs's [sic] sister park, expressly prohibits the use of "motor vehicles, motorized equipment . . . , [or any] other form of mechanical transport" in the Boundary Waters Canoe Area. 16 U.S.C. § 1132(c).

based on a series of NPS and FWS investigations and reports. In its 1989 draft trail plan, for example, the NPS found that "[p]ersons on foot (hikers, skiers, or snowshoers) seem to have grater effects than snowmobilers do by causing animals to run sooner and farther than they run from snowmobiles." See *id.*, Tab 13, at 16. The NPS made similar findings in its 1990 environmental assessment, which evaluated the potential impact of lake surface snowmobiling *Id.*, Tab 29. The 1990 assessment anticipated that passing snowmobiles or other winter recreationists would sometimes displace wolves feeding on deer carcasses along shorelines. The report then determined that, because wolves normally hunt and devour their kills in the evenings and early mornings, and because they spend relatively short periods of time on a kill, there was little chance for long-term displacement. The NPS assessment noted,

Although the frequency of displacement by winter recreationists and return of wolves to prey have not been formally studied at Voyageurs, if winter recreationists have a significant detrimental effect on the park's wolf population, it has not been reflected in the relative stability of the population during the first 15 years of the park's existence.

Id., Tab 29, at 10.

The Fish and Wildlife Service made similar findings in its April, 1989, biological opinion. The opinion stated that the NPS's proposed snowmobile trail across the Kabetogana Peninsula would not jeopardize the continued existence of the gray wolf in Minnesota or adversely

modify its critical habitat.⁶ *Id.*, Tab 19, at 12. The 1989 opinion added that restricting snowmobiles to established trails could benefit wolves. Nevertheless, Fish and Wildlife concluded that "no incidental take is anticipated to result from the [NPS's] proposed action and none is authorized." *Id.*, Tab 19, at 13. In June, 1990, the FWS reiterated its 1989 opinion and extended its application to snowmobile trails traversing lake surfaces. The FWS concluded that lake surface snowmobiling would not adversely affect the gray wolf or bald eagle beyond the impacts indicated in its 1989 opinion.⁷ *Id.*, Tab 26.

As it developed Voyageurs' snowmobiling regulations, the NPS also consulted with Dr. David Mech and other renowned wildlife biologists. Dr. Mech stated,

I know of no evidence, or reason to believe, that snowmobiling . . . or other winter sports will have a detrimental effect on the survival of [the Voyageurs] wolf population. Wolves' avoidance of well used human trails should cause them no

⁶ The FWS noted its findings would need to be reassessed based on the first formal NPS report on gray wolf research. The research was to be completed by September, 1991, with a final report due in 1992. No such report appears in the administrative record.

⁷ The FWS recognized that this finding was also subject to change based on gray wolf research and proposed research concerning the cumulative impacts of snowmobiles and other human caused disturbances. The FWS stated, "While we share the general belief that such [cumulative] impacts may be insignificant, such opinions are primarily based on a loose collection of expert observations."

real inconvenience nor should it interfere with their hunting.

Id., Tab 7.

2. The Fish and Wildlife Service's 1992 Biological Opinion

In August, 1991, the NPS completed a draft wilderness plan recommendation and revised environmental impact statement for Voyageurs. The wilderness plan proposed continued motorized access to the major lake surfaces, 16 miles of snowmobile portages, and all lake surfaces connected by the Chain of Lakes trail. The plan also contemplated reduced snowmobile use on onland trails. This diminution was to be accomplished by limiting onland snowmobiling to a 12-foot wide track on the Kabetogama Peninsula. The NPS made this recommendation after concluding that snowmobiling on onland trails might adversely impact the gray wolf population. After issuing its wilderness plan, the Park Service requested a biological opinion from the FWS.

In preparing its biological opinion, Fish and Wildlife asked the Park Service for evidence of any harassment or taking of gray wolves within the park. *Id.*, Tab 44. The NPS responded that it had little evidence of harassment or takings. *Id.*, Tab 45, at 8. Concerning harassment, the Park Service reported "casual observations" suggesting that snowmobilers disturbed wolves feeding on kills along the shorelines of major lakes. The NPS received reports indicating that some snowmobilers may have removed choice cuts of meat from wolf-killed deer. The NPS concluded, however, that "[t]he extent to which a

given wolf pack is disturbed and, once disturbed, abandons a kill is unknown."

The NPS reported two apparent aerial gunnings of wolves at Namakan Lake. The shootings occurred in December, 1986, and March, 1988. It was unclear whether either shooting occurred within the Park. The Court notes that the NPS could not substantiate any other rumors of wolves being killed illegally in the Park, but acknowledged that many wolves were illegally killed beyond its borders.⁸

In March, 1992, the FWS issued a biological opinion concluding that the proposed wilderness plan would not jeopardize the continued existence of the bald eagle or gray wolf in Minnesota or adversely affect the wolves' critical habitat. *Id.*, Tab 46. Notwithstanding this lack of empirical evidence or competent expert evidence to support it, Fish and Wildlife expressed concern over allowing snowmobiling across the Kabetogama Peninsula and on the major lakes. The FWS acknowledged that snowmobiler disruption of wolves hunting prey seemed insignificant on a case-by-case basis, but hypothesized that "repeated disruptions may lead to a cumulatively significant affect, particularly during periods of stress caused by severe weather or reduced prey availability." The FWS

⁸ Human-caused mortality was significant on radio-collared animals venturing outside the Park between 1987 and 1989. Of 18 wolves fitted with radio collars in the fall of 1987, five were illegally killed outside of the Park within 18 months. In addition, two radio collars were recovered under circumstances suggesting the wolves wearing them had been killed. See *Admin. Rec.*, Tab 64, at 4.

concluded with the unsurprising statement that "[i]nformation provided . . . [by] the National Park Service points directly to the need for a better understanding of the impact of human disturbance on the gray wolf population in Voyageurs National Park."

Fish and Wildlife issued an incidental take statement along with its biological opinion. *Id.*, Tab 46. Based on the survival rate of wolves and reports of takings, the FWS decided that no more than six individual wolves could be taken incidental to the management of the Park.

In March, 1992, Fish and Wildlife directed the Park Service to implement trail closures consistent with its biological opinion and the incidental take statement. In a memo sent to NPS's midwest regional director in May, 1992, Voyageurs Park Superintendent Ben Clary expressed his disagreement with the opinion and the recommended closures. He stated, "The leading wildlife biologist[s], including the USFWS biologist, have once again stated that snowmobiling will not have [a] significant impact on the gray wolf. For this reason, we should question the opinion." *Id.*, Tab 49, at 4. Clary's memo concluded, however, that the "legal ramifications of the opinion" left him no choice but to implement the closures. On December 16, 1992, Clary issued an order closing 16 of the Park's lake bays and certain shoreline areas to motorized access during the winter.⁹ *Id.*, Tab 53. The

⁹ The restricted use areas are dispersed throughout the Park and total 6,541 acres or 7 percent of the Park's total water acreage and 3 percent of the total park acreage. The closures cover the entire northwest quadrant of Kabetogama Lake, as well as some smaller lakes and embayments of larger lakes in

order was issued pursuant to 36 C.F.R. § 7.33(b)(3), which authorizes temporary closure of lake surfaces to achieve wildlife management objectives. No notice was published in the Federal Register and no comment period was allowed. The closures continued as the order was renewed in 1993 and 1994. *Admin. Rec.*, Tabs 57 and 59.

3. 1994 Supplement to the 1992 Biological Opinion

The 1992 closures drew numerous objections, primarily from potential Park visitors who could no longer enjoy some of Voyageurs' finest scenery and natural experiences. Plaintiffs in this action filed a notice of intent to sue in the fall of 1993, and filed their complaint on January 1, 1994.

Upon receiving plaintiffs' notice of intent to sue, the FWS supplemented its 1992 biological opinion, ostensibly to clarify its position. This supplement, issued February 16, 1994, stated that the lakeshore closures were designed to minimize the harm, harassment, and taking of gray wolves. *Id.*, Tab 64. The FWS explained that although snowmobiles themselves do not impact the gray wolf, the vehicles provide access for individuals who would harm

the park. (1) Rainy Lake - Cranberry Bay, Marion Bay, Browns Bay, southwest half of Saginaw Bay and an unnamed bay located immediately west of Laurins Bay; (2) Namakan Lake - Hammer Bay and Junction Bay; (3) Sand Point Lake - Swansons Bay, Brown Bay and an unnamed bay off the south of Grassy Bay; (4) Kabetogama Lake - eastern half of Sullivan Bay, Lost Lake, Blind Ash Bay, the Lost Lake-Long Slu-Elks Bay complex, Daley Bay and Tom Code Bay.

the species. Thus, by selecting areas for closure known to be of greater habitat value to the gray wolf and their prey, it was the FWS's expressed intent to reduce the opportunity for adverse human/wolf contact.

The FWS characterized wolf harassment as "infrequent" but "not an unheard of event." *Id.*, Tab 64, at 5. The FWS listed four to five records of "incidents that constitute take by the harassment or harming of gray wolves."¹⁰ *Id.*, Tab 64, at 6. The FWS also cited "numerous additional reports of harassment of gray wolves, . . . most of which are anecdotal and not well documented." Fish and Wildlife acknowledged that "without documentation, there is little or no evidence that these incidents have resulted in a taking as defined by the ESA and its regulations."

In its 1994 supplement, the FWS also revised its incidental take statement. The FWS stated that the incidental take statement accompanying the 1992 biological opinion did not differentiate between wolves harmed by natural causes and wolves harmed by takings. Accordingly, in its 1994 supplement, the FWS estimated that roughly one incident of gray wolf taking occurred annually. Based upon these materials and this evidence, the

¹⁰ Evidence of takings of gray wolves includes deer carcass studies conducted by park personnel. Of 43 deer carcasses examined by park personnel in 1988 and 1989, two were found with evidence of human scavenging, indicating wolves had been driven off their kills. Many other deer carcasses consisted of remains that would leave no evidence of human scavenging. *Admin. Rec.*, Tab 64, at 4-5.

FWS reduced the permissible number of incidental takings from 6 to 2 wolves per year. *Id.*, Tab 64, at 6.

II. Discussion

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 246 (1986). In the present case, all parties agree there is no material fact in dispute, leaving their cross-motions for summary judgment ripe for decision.

A. Standing

Plaintiffs must meet the requirements of Article III standing to bring suit under the ESA. *Defenders of Wildlife v. Hodel*, 851 F.2d 1035, 1039 (8th Cir. 1988); ¹¹ *see also* 16 U.S.C. § 1540(g) (stating that "any person" may commence a suit to enjoin any person or government entity alleged to have violated the ESA). Contrary to defendants' suggestion, the Court does not find this to be an onerous burden. To establish Article III standing, plaintiffs must show that (1) they have suffered an injury in fact, (2) the injury can fairly be traced to the conduct

¹¹ *Accord Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 115 S. Ct. 2407 (1995) (plaintiffs with an economic interest in the forest products industry brought action under the ESA challenging regulations promulgated by Secretary of Interior). *But see Bennett v. Plenert*, 63 F.3d 915 (9th Cir. 1995) (applying "zone of interest" test of prudential standing to plaintiffs bringing suit under the ESA).

complained of, and (3) the injury is likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations omitted).

Plaintiffs Jeffrey Mausolf, William Kullberg, and Arlys Strehlo are members of the Minnesota United Snowmobilers Association.¹² Their affidavits establish that they have used and wish to continue using the Park's now-restricted areas for snowmobiling and wildlife observation. Plaintiffs claim they have been harmed by the closure because they are prevented from observing wolves in their natural habitat. Plaintiffs also contend they have been injured because the closures were imposed without a proper basis under the ESA. They assert that the FWS has gone beyond the authority of the ESA by imposing unnecessary and insupportable restrictions.

Based upon these unchallenged assertions, the Court finds that plaintiffs, as individuals, meet the constitutional requirements for standing: they allege injuries in fact; the injuries are concrete, particularized, and immediate; the lakeshore closures imposed by defendants have caused these injuries; and the injuries can be redressed by the relief they seek. The plaintiffs have standing to bring suit under the ESA.

¹² It appears to be unchallenged that the interests alleged by plaintiffs are sufficiently related to the purposes of the Minnesota United Snowmobilers Association such that the association has standing if any of its members do.

Defendants offer a second line of defense: they assert that although plaintiffs may satisfy constitutional standing requirements, they lack standing under the Administrative Procedures Act. Defendants contend that plaintiffs' concerns fall outside the "zone of interests" protected by the Endangered Species Act because, according to defendants, plaintiffs' interest is in recreational snowmobiling and the ESA's interest is species protection. Based on this dichotomy, defendants deny plaintiffs can bring an APA claim.

The APA provides that persons "adversely affected or aggrieved by agency action within the meaning of a relevant statute" may bring suit to challenge a final agency action. 5 U.S.C. § 702. Accordingly, under the APA, plaintiffs must show the challenged agency action resulted in injury to an interest arguably within the "zone of interests" protected by the statute at issue. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 893 (1990); *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972).

The prudential "zone of interests" test is to be broadly construed and is not especially demanding. *Clarke v. Security Industry Ass'n*, 479 U.S. 388 (1987). "The essential inquiry is whether Congress 'intended for a particular class of plaintiffs to be relied on to challenge the agency disregard of the law.'" *Id.* at 399 (quoting *Block v. Community Nutrition Inst.*, 467 U.S. 340, 347 (1984)). There need only be a "plausible relationship" between the interests of the plaintiffs and the policies embodied in "the overall context" of the statute at issue. *Id.* at 401-02.

In the present case, defendants argue plaintiffs' interests fall beyond those meant to be protected under the ESA. Defendants claim plaintiffs' true interest is in unlimited motorized access to the Park – they suggest plaintiffs have concocted their "concern" about decreases in wildlife observation solely to invoke federal jurisdiction. Defendants assert further that even if plaintiffs sincerely desire an opportunity to observe wildlife in the Park's restricted areas, they still lack standing because plaintiffs' claim does not flow from a risk of harm to wolves or bald eagles.

The Court rejects defendants' arguments. Certainly, in most environmental cases, plaintiffs' asserted interest is directly aligned with the listed species' interests, i.e., the plaintiff claims injury because the challenged agency conduct threatens to diminish or deplete the numbers of endangered animals available for observation. *See, e.g., Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978) (claiming construction of Tellico Dam would injure endangered snail darter); *Sierra Club v. Froehlke*, 534 F.2d 1289 (8th Cir. 1976) (claiming construction of Meramec Park reservoir would jeopardize endangered Indiana bat). The Court finds, however, that interests other than those asserted on behalf of endangered species also fall within the zone of interests protected by the ESA.

Standing "is not a concept that can be defined by strict metes and bounds and is not susceptible to facile application." *Banks v. Secretary of Ind. Family & Social Servs. Admin.*, 997 F.2d 231, 238 (7th Cir. 1993). Although plaintiffs' immediate concern may not be protection of wolves or their habitat, the desire to observe an animal species, even for purely aesthetic purposes, is undeniably

a cognizable interest for purposes of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. at 562-63 (citing *Sierra Club v. Morton*, 405 U.S. at 734). The Court finds that plaintiffs have expressed an interest within the ambit of the ESA.

Defendants contend, however, that plaintiffs' stated harm is not cognizable under the ESA and APA. The Court notes with interest that counsel for defendants could not identify a single potential plaintiff who would have standing to complain if the government took steps to "overprotect" listed species.¹³ The Court is unwilling to adopt the view that the FWS is unrestrained if it cloaks any of its acts in the laudable robe of endangered and threatened species protection. This is a form of totalitarian virtue – a concept for which no precedent has been advanced and which is foreign to the rule of law. It is, instead, the Court's view that the FWS must operate within the parameters of the ESA. *See, e.g., Sweet Home Chapter of Communities for a Great Or.*, 115 S. Ct. at 2421 (O'Connor, J., concurring) (discussing regulations promulgated pursuant to the ESA and stating that "[o]ne can

¹³ The government, during oral argument, expressed the view that there is absolutely no judicial recourse for persons who contend the FWS acts overzealously on behalf of listed species. In response to a hypothetical posed by the Court, defendants asserted that the FWS could close the entire park to human access to minimize the possibility of any incidental takes of protected species. Defendants took the remarkable position that such an action would be immune from challenge, and entirely beyond review, because it *benefits*, rather than *harms*, endangered or threatened species. The government maintained this position, even recognizing the extremely conjectural risk of incidental taking in this case.

doubtless imagine questionable applications of the regulation that test the limits of the agency's authority").¹⁴ Defendants question plaintiffs' true interest in challenging the lakeshore closures, but do not suggest that plaintiffs lack any concern for wolf protection in the Park. Thus, plaintiffs' interests are congruent with the purposes of the ESA because plaintiffs, too, are ultimately served by a thriving wolf population in Voyageurs Park.

B. Authority Under the ESA to Implement the Closures

The Court recognizes its obligation to accord agency determinations great deference. A court may overturn agency actions only if they are "arbitrary, capricious, or manifestly contrary to the statute." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984); see also *Froehlke*, 534 F.2d at 1301 (stating that agency action under the ESA is subject to the "arbitrary and capricious" standard of review). When an agency determination involves construction of an administrative regulation, rather than a statute, deference "is even more clearly in order." *Udall v. Tallman*, 380 U.S. 1, 16 (1965). If an agency's determination is supportable on any rational basis, a court must uphold it. *Production Credit Ass'n v. Farm Credit Admin.*, 783 F. Supp. 416, 417

¹⁴ Adopting defendants' position would restrain challenge and judicial review of species-protective measures to an agency's "upstream," as opposed to "downstream," action. That is, any agency action declared protective of a species would, *ab initio*, be immune from review. A court could only consider an agency action that was deemed inimical to a species' survival.

(D. Minn. 1991); see also *Bowman Trans., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281 (1974) (stating that courts must not attempt to "substitute their judgment for that of the agency").

Even under such a deferential standard of review, an unsupported agency decision is not sacrosanct. An action is considered arbitrary and capricious if the agency's explanation in support "runs counter to the evidence before the agency." *Defenders of Wildlife v. Administrator Envtl. Protection Agency*, 688 F. Supp. 1334, 1348 (D. Minn. 1988) (Murphy, J.), *aff'd in part, rev'd in part on other grounds*, 882 F.2d 1294 (8th Cir. 1989).

Plaintiffs contend the lakeshore closures were arbitrary and capricious because: (1) the NPS and the FWS did not adequately explain the action; (2) the NPS and the FWS relied on anecdotal evidence in ordering the closures; and (3) the NPS and the FWS failed to consider important issues surrounding the closures. Defendants reply that the closures are "exceedingly reasonable" and based on the best available evidence.

The Court agrees with plaintiffs that defendants failed to explain adequately the reasons for the closures. Because the Court finds the government's explanation inadequate, the Court must remand the matter to the FWS and the NPS to allow them to supplement the administrative record. See *Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976). In finding the government's explanation for the closures inadequate, the Court rejects plaintiffs' flat assertion that defendants may not rely on anecdotal evidence. Plaintiffs

argue, in effect, that anecdotal evidence can never constitute scientific evidence sufficient to support ESA actions. Plaintiffs cite no cases in support of this proposition, and the Court declines to hold that anecdotal evidence can never be a basis for an ESA action. There remains, however, a deep concern whether wholly anecdotal evidence can constitute the "best scientific and commercial data available," required under the ESA.

A generous review of defendants' evidence reveals: Snowmobilers and other winter recreationists have apparently displaced some wolves feeding on kills along shorelines, but scientific evidence shows the likelihood of permanent displacement is less than minimal. Of the four validated reports of wolf takings, two were aerial gunnings, bearing no relation to snowmobile trail closures. One poacher drove a wolf off a kill and scavenged the remains, with neither evidence nor suggestion that a snowmobile was present. Finally, one snowmobiler apparently permanently displaced a wolf feeding on a kill. The only formal, scientifically prepared reports indicate that snowmobilers have no significant impact on wolf or eagle populations, although "generally accepted" principles indicate that increased Park access, by whatever means, will likely result in increased mortality among individual animals.

Upon reviewing this evidence, the Court finds it does not support the decision to limit snowmobiling, an activity that has gone on for many years within Voyageurs. The Court shares defendants' concern for any reported takings of Voyageurs wolves, but finds that the evidence presently in the record is inadequate to establish that curtailing snowmobiling will improve the condition of

this stable population. See *Defenders of Wildlife*, 688 F. Supp. at 1348.

The Court finds the agency's conclusion that these lakeshore closures are reasonably necessary to prevent incidental takings of Voyageurs wolves and bald eagles is based on little more than speculation. In the end, the FWS and the NPS simply contend that temporary displacements of these species may evolve into permanent displacements if snowmobilers are allowed continued access to lakeshore trails. There is absolutely no evidence in the record to support this proposition. Indeed, the only record evidence is to the contrary: both the FWS and the NPS have reported that temporary dispersal rarely results in permanent displacement from a kill. *Admin. Rec.*, Tabs 19, 26, and 29. See *Sweet Home Chapter of Communities for a Great Or.*, 115 S. Ct. at 2420 (O'Connor, J., concurring) (discussing the definition of "harm" under the ESA and stating that "the regulation clearly rejects speculative or conjectural effects").

Defendants finally cling to the argument that the lakeshore closures are reasonable because of the "generally accepted" principle that increased access to wildlife will result in increased mortality. This argument, too, falls short. This "generally accepted" principle applies equally to any mode of transportation – snowmobiles, motor vehicles, skis, snowshoes, hiking, or aircraft. The value, if any, of a snowmobile bar on the basis of such evidence is purely speculative. See *id.* (O'Connor, J., concurring) (stating that speculation will not support agency actions under the ESA); *Greenpeace Action v. Franklin*, 14 F.3d

1324, 1337 (9th Cir. 1992) (upholding measures promulgated under the ESA "premised . . . on a reasonable evaluation of available data, not on pure speculation").

The danger of premising lakeshore closures on "generally accepted principles," rather than on particularized evidence, is apparent. Facile resort to the precept that "increased access leads to increased mortality," if taken to its logical extreme, would allow the FWS and the NPS to close Voyageurs altogether. This was not Congress's intent when it established Voyageurs.

III. Conclusion

Having found that the government's explanation for the lakeshore closures is presently inadequate, the Court remands this matter to the FWS and the NPS to supplement the administrative sufficient explanation for the closures, the Court enjoins their enforcement, pursuant to 16 U.S.C. § 1540(g)(1)(A).¹⁵

Accordingly, IT IS ORDERED that:

1. Plaintiffs' motion for summary judgment is granted.

¹⁵ The Court's determination that the lakeshore closures are, at present, invalid does not extend, of course, to the closure of trails surrounding eagles' nests during the eagles' breeding season. As already noted, the parties have stipulated that such closures are valid.

Because the Court determines the lakeshore closures, beyond the eagles' breeding season, are invalid under the ESA, it need not address at this time plaintiffs' argument that the closures violate the APA.

2. Defendants' motion for summary judgment is denied.

3. This matter is remanded to the FWS and the NPS for further evidentiary findings consistent with this opinion. Pending further explanation from these agencies, defendants are enjoined from enforcing the lakeshore closures.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: January 23rd, 1996

/s/ James M. Rosenbaum
JAMES M. ROSENBAUM
United States
District Judge

2
No. 95-813

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

BRAD BENNETT, ET. AL.*Petitioners,*

v.

MARVIN PLENERT, ET. AL.*Respondents.*

On Petition For a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

**BRIEF AMICI CURIAE OF
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OF THE UNITED STATES
AND THE BUILDING INDUSTRY LEGAL DEFENSE
FOUNDATION IN SUPPORT OF PETITIONERS**

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15 pp

TABLE OF CONTENTS

	PAGE(S)
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI CURIAE	1
SUMMARY OF REASONS FOR GRANTING THE WRIT	3
REASONS FOR GRANTING THE WRIT	3
A. ESA Standing Is A Critical Issue For Property Owners Throughout The Country	3
B. The Ninth Circuit Decision Ignores The Will Of Congress	6
C. The Ninth Circuit Decision Rewrites The Zone Of Interests Test	7
D. The Ninth Circuit Decision Closes The Courthouse Door On Regulated Parties	8
CONCLUSION	10

TABLE OF AUTHORITIES

Cases:	PAGE(S)
<i>Association of Data Processing Service Organizations, Inc. v. Camp</i> , 397 U.S. 150 (1970)	7
<i>Agins v. City of Tiburon</i> , 447 U.S. 255 (1980)	1
<i>Babbitt v. Sweet Home Chapter of Communities for a Great Oregon</i> , 115 S. Ct. 2407 (1995)	3,4,7,8
<i>Bennett v. Plenert</i> , 63 F.3d 915 (9th Cir. 1995)	3,5,6
<i>Clarke v. Securities Industry Ass'n</i> , 479 U.S. 388 (1987)	7
<i>Dolan v. City of Tigard</i> , 114 S. Ct. 2309 (1994)	1
<i>First English Evangelical Lutheran Church of Glendale v. County of Los Angeles</i> , 482 U.S. 304 (1987)	1
<i>Florida Key Deer v. Stickney</i> , 864 F. Supp. 1222 (S.D. Fla. 1994)	5
<i>Hazardous Waste Treatment Council v. Thomas</i> , 885 F.2d 918 (D.C. Cir. 1989)	8
<i>Idaho Farm Bureau Fed'n v. Babbitt</i> , 900 F. Supp. 1349 (D. Idaho 1995)	6
<i>Lucas v. South Carolina Coastal Council</i> , 112 S. Ct. 2886 (1992)	1
<i>MacDonald, Sommer & Frates v. County of Yolo</i> , 477 U.S. 340, reh'g denied, 478 U.S. 1035 (1986) . . .	1
<i>NAHB and TxCBA v. Babbitt</i> , C.A. No. 1:95CV01374 RMU (D.D.C. 1995)	9
<i>NAHB v. Babbitt</i> , Cit. No. 1:95CV01933 RMU (D.D.C. 1995)	2

<i>Nollan v. California Coastal Comm'n</i> , 483 U.S. 825 (1987)	1
<i>Olmstead v. United States</i> , 277 U.S. 438 (1928)	2
<i>San Diego Gas & Electric Co. v. City of San Diego</i> , 450 U.S. 621 (1981)	1
<i>Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.</i> , 454 U.S. 464 (1982)	8
<i>Williamson County Regional Planning Commission v. Hamilton Bank</i> , 473 U.S. 172 (1985)	1
<i>Yee v. City of Escondido</i> , 112 S. Ct. 1522 (1992)	1
Statutes	
16 U.S.C. §§ 1531-1544	2
16 U.S.C. § 1532 (13)	7
16 U.S.C. § 1536	7
16 U.S.C. § 1536 (a)(2)	4
16 U.S.C. § 1538	7
16 U.S.C. § 1539	7
16 U.S.C. § 1540 (g)(1)	6
33 U.S.C. §§ 1251-1387	5
33 U.S.C. § 1344	5
42 U.S.C. §§ 7401-7671q	5
Regulations	
50 C.F.R. § 17.95 (a)	4
Miscellaneous	
57 <i>Federal Register</i> 1796 (1992)	4
59 <i>Federal Register</i> 5827 (1994)	4
59 <i>Federal Register</i> 13374 (1994)	4
59 <i>Federal Register</i> 58982 (1994)	5
59 <i>Federal Register</i> 65256 (1994)	4

60 <i>Federal Register</i> 5893 (1995)	5
60 <i>Federal Register</i> 10694 (1995)	5
60 <i>Federal Register</i> 25882 (1995)	5
60 <i>Federal Register</i> 40892 (1995)	5
<i>Houston Post</i> (August 28, 1994)	5
General Accounting Office, Endangered Species Act: Information On Species Protection on Non-Federal Lands (1994)	4
General Accounting Office, Endangered Species Act: Types and Number of Implementing Actions (1992) .	5

The National Association of Home Builders of the United States ("NAHB") has received the written consent of the parties to file this brief in support of petitioners, and has filed the letters of consent with the Clerk of this Court.

INTEREST OF THE AMICI CURIAE

The NAHB represents more than 180,000 builders and associate members organized in approximately 850 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. Its members include not only people and firms that construct and supply single-family homes, but also apartment, condominium, commercial and industrial builders, as well as land developers and remodelers. It is the voice of the American shelter industry.¹

The Building Industry Legal Defense Foundation ("BILD") is a not-for-profit corporation organized under the laws of the state of California. The BILD is a wholly owned subsidiary of the Building Industry Association of Southern California ("BIA-Southern California"). BIA-Southern California is an NAHB affiliate with over 1400 members involved in all aspects of the building and construction industry. BIA-Southern

¹ The NAHB has been before this Court either as an *amicus curiae* in support of, or as of counsel on behalf of, the property owner in prior cases involving government land use decisions. *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994); *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992); *Yee v. City of Escondido*, 112 S. Ct. 1522 (1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, *reh'g denied*, 478 U.S. 1035 (1986); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980). The NAHB brief was cited approvingly in this Court's *Nollan* opinion, 483 U.S. at 840.

California members are involved in the construction of 70% of all new homes in the Southern California Region.²

The interests of the NAHB and BILD (collectively the Building Industry Amici) lie in seeing that the implementation of laws concerning or affecting the use of private property remains consistent, fair, and cognizant of the need to protect the rights of the individual when confronted with government actions which impinge on constitutional guarantees.³ The Building Industry Amici have a particular interest in the administration of federal environmental statutes such as the Endangered Species Act, 16 U.S.C. §§ 1531-1544 ("ESA"), given the far-reaching impact that these laws have upon private land use and land-use regulation.⁴

The Building Industry Amici believe that this brief will assist the Court in making its decision whether to grant review of the issues presented in the Petition. The Building Industry Amici's concerns are much broader than those of petitioners, since its members are faced with countless regulatory decisions on a daily basis across the nation that affect the use of privately held land. The Building Industry Amici's brief addresses the broader public policy reasons why review should be granted.

² The BILD's mission is to "[d]efend the legal rights of home and property owners." The BILD promotes and supports legal cases to secure a body of favorable court decisions for its members specifically, and property owners and developers generally.

³ As Justice Brandeis insightfully admonished:

Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

⁴ NAHB and BILD have filed an action against Secretary Babbitt — *NAHB v. Babbitt*, Civ. No. 1:95CV01973 RMU (D.D.C. 1995) — challenging the Interior Department's authority to enforce certain provisions of the Endangered Species Act of 1973 ("ESA") in connection with its listing of the Delhi Sands Flower-loving Fly as endangered. That action involves standing issues similar to those raised by petitioner in this case.

SUMMARY OF THE REASONS FOR GRANTING THE WRIT

The Court should grant Petitioner's writ because the lower court has decided a question of national importance in a way that conflicts with this Court's precedents. Moreover, the effect of the lower court's decision is to abrogate the rights of an enormous class of citizens to seek legal redress in the face of ever burgeoning federal regulations.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Ninth Circuit's decision held that "only plaintiffs who allege an interest in the preservation of endangered species fall within the zone of interests protected by the ESA."⁵ According to that court:

Given that the clear purpose of the ESA is to ensure the protection of endangered species, we conclude that suits by plaintiffs who are interested only in avoiding the burdens of that preservation effort 'are more likely to frustrate than to further statutory objectives.'⁶

As argued below, the issue of standing to challenge ESA determinations is of critical importance to property owners generally, and the Building Industry Amici's members specifically. The Ninth Circuit has neutered property owners' ability to protect themselves in court from unlawful ESA regulation. Moreover, the Ninth Circuit only reached its decision by ignoring the will of Congress and by rewriting this Court's prudential standing test.

A. ESA Standing Is A Critical Issue For Property Owners Throughout The Country

The impact of the Ninth Circuit's decision cannot be understated. As this Court recognized in *Babbitt v. Sweet Home Chapter*

⁵ *Bennett v. Plenert*, 63 F.3d 915, 919 (9th Cir. 1995).

⁶ 63 F.3d at 919.

of *Communities for a Great Oregon*, 115 S. Ct. 2407 (1995), the ESA provides for the federal regulation of land which constitutes endangered species' habitat. Some 965 species are currently listed as endangered or threatened in the United States, most of which have habitat on private property. As of May 1993, 90% of the 781 species listed as endangered or threatened under the ESA inhabited non-federal lands. Of these listed species, 517 had over 60% of their total habitat on non-federal lands.⁷

The habitat for these species and the 184 species that have been listed as endangered or threatened since May 1993 covers tens of millions of acres, much of it private property, and hundreds, if not thousands, of river miles. The Secretary has already designated critical habitat for some 115 species covering millions of acres.⁸ As this Court held in *Sweet Home*, Section 9 of the ESA prohibits the taking of endangered animals, including modification of habitat which impairs behavioral patterns, without a permit. Thus, the listing of a species in effect results in federal regulation of all of that species' habitat wherever it happens to be found. Moreover, Section 7(a)(2) of the ESA requires federal agencies to ensure that their actions do not jeopardize the continued existence of an endangered or threatened species. 16 U.S.C. § 1536(a)(2). In addition, the designation of critical habitat imposes on all federal agencies an obligation to ensure that their actions will not result in the adverse modification of that critical habitat. *Id.* These obligations extend to all types of

⁷ See General Accounting Office, *Endangered Species Act: Information on Species Protection on Non-Federal Lands*, 4-5 (Dec. 1994).

⁸ For example, the Secretary has designated approximately 6.9 million acres as critical habitat for the Northern spotted owl, 57 *Fed. Reg.* 1796 (1992); 4.6 million acres for the Mexican spotted owl, 59 *Fed. Reg.* 5827 (1994); and 6.3 million acres for the gray wolf, 50 C.F.R. §17.95 (a). In addition, the Secretary has designated 1,980 miles of the Colorado River and its tributaries as critical habitat for four fish species, 59 *Fed. Reg.* 13374 (1994); and has designated the entire Sacramento - San Joaquin River delta - which lies at the heart of the water system serving much of the State of California - as critical habitat for the delta smelt, 59 *Fed. Reg.* 65256 (1994).

federal actions, including actions relating to private property, e.g., federal funding for state, local, and private projects; issuance of federal permits to discharge dredged or fill material into wetlands and other waters of the United States pursuant to Section 404 of the Clean Water Act, 33 U.S.C. § 1344; issuance of other permits under the Clean Water Act, 33 U.S.C. §§ 1251-1387; and the Clean Air Act, 42 U.S.C. §§ 7401-7671q; and, the provision of federal flood insurance, see *Florida Key Deer v. Stickney*, 864 F. Supp. 1222 (S.D. Fla. 1994).⁹ These prohibitions are likely to be extended to tens of millions of additional acres in the future as the Secretary designates critical habitat for some of the 800 endangered and threatened species currently lacking critical habitat designations or some of the more than 3000 species that are currently candidates for listing under the ESA.¹⁰

Thousands of consultations are conducted every year under Section 7. See General Accounting Office, *Endangered Species Act: Types and Number of Implementing Actions* 30 (1992)

⁹ Thus, no comfort can be drawn from the Ninth Circuit's disclaimer that it was not ruling on the standing of directly regulated parties, but rather only on indirectly regulated parties. 63 F.3d at 917, n.2. The effect of an ESA regulation upon the regulated party is just as real when filtered through another federal agency.

¹⁰ For instance, the Secretary has proposed to designate 4.45 million acres in three states as critical habitat for the marbled murrelet, 60 *Fed. Reg.* 40892 (1995), 860,000 acres of lake, stream and shoreline for the Lost River sucker and the shortnose sucker, 60 *Fed. Reg.* 5893 (1995), and 20,000 acres on 210 miles of coastline (10% of the California, Oregon and Washington coastline) for the Western snowy plover, 60 *Fed. Reg.* 25882 (1995). The Secretary at one time considered a proposal to designate portions of 33 Texas counties as critical habitat for the Golden-cheeked Warbler. Scott Harper, *Endangered: Species or Rights*, Houston Post, August 28, 1994 at A1. Other newly listed and candidate species also have extensive ranges. The Southwestern willow flycatcher is thought to inhabit portions of seven states. 60 *Fed. Reg.* 10694 (1995). The Northern goshawk, a species which the Secretary has determined may warrant listing as endangered or threatened, is found throughout much of the conterminous United States. See 59 *Fed. Reg.* 58982, 58990 (1994) (goshawk historically has nested in 26 states and regularly visited 19 others).

(over 18,000 consultations conducted during the period FY 1987 to FY 1991). These numbers have increased as more species are added to the list of endangered and threatened species. These consultations can have a substantial impact on property owners. However, due to their "competing interest"¹¹ (*i.e.* — the desire to use their land), property owners under the jurisdiction of the Ninth Circuit will not be able to challenge these consultations no matter how substantially or directly they are affected. Moreover, while this case involves a Section 7 consultation, the rationale of the Ninth Circuit's decision has already been extended to deny similarly situated parties standing to challenge a decision to list a species. *See Idaho Farm Bureau Fed'n v. Babbitt*, 900 F. Supp. 1349 (D. Idaho 1995). This rationale would extend to critical habitat designations as well.

Thus, the Ninth Circuit decision shuts the courthouse doors to those who are most affected by a wide range of decisions under the ESA.

B. The Ninth Circuit Decision Ignores The Will Of Congress

The Building Industry Amici agree with petitioners that it was error for the Ninth Circuit to apply the zone of interests test to the subject ESA claims. Congress clearly and unequivocally extended standing under the ESA to the limits of Article III of the United States Constitution through its enactment of 16 U.S.C. § 1540 (g)(1). That provision allows *any* person to bring suit to challenge the Secretary's actions under the ESA.

The term "person" is liberally defined in the ESA to mean: an individual, corporation, partnership, trust, association, or any other private entity, or any officer, employee, agent, department or instrumentality of the Federal government, of any State or political subdivision thereof, or any foreign government.

¹¹ 63 F.3d at 921.

16 U.S.C. § 1532 (13). Notably, there is no qualification within this definition such as to exclude a "person" with a "competing interest" or to restrict standing to a person who *only* seeks to further the ESA's statutory objectives. Rather, the standing conferred under the ESA is broad, open-ended, and inclusive.

C. The Ninth Circuit Decision Rewrites The Zone Of Interests Test

Assuming *arguendo*, that the zone of interests test does indeed apply to ESA claims, the Ninth Circuit's decision misapplied the test completely, rewriting the test so as to exclude those persons *regulated* by the ESA.¹² This is contrary to this Court's clear mandate that the zone of interests test included those whose interests fall within either the "zone of interests to be protected *or* regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970) (emphasis added). *See also Clarke v. Securities Industry Ass'n*, 479 U.S. 388 (1987).

Both petitioners and the Building Industry Amici's members clearly fall within the category of those Congress intended to regulate under the ESA. Through the "take" provisions contained in 16 U.S.C. § 1538, along with the permitting provisions of 16 U.S.C. §§ 1536 and 1539, and the accompanying regulations, the ESA acts to closely regulate the use of land which may be occupied by listed endangered species.¹³ Individuals are prohibited from harming endangered animals, including habitat modifications which significantly impair an animal's behavioral patterns. *See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407 (1995). These provisions become effective as soon as a species is listed as endangered, requiring

¹² This group would include not only petitioners, but the Building Industry Amici's members, as well as most all property owners and users generally.

¹³ The "use of land" is, of course, the foundation — both literally and figuratively — of the building and construction industry. Moreover, in this case, petitioners are regulated in their use of the water which constitutes the habitat of the Lost River sucker and the short nose sucker.

landowners to immediately conform their conduct to this requirement.¹⁴ Therefore, there can be no argument that petitioners are regulated by the ESA. As such, petitioners should have standing to challenge ESA determinations in court.

D. The Ninth Circuit Decision Closes The Courthouse Door On Regulated Parties

The United States Constitution, Article III, limits the jurisdiction of the federal courts to the resolution of "cases" or "controversies". *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). Common sense dictates that the essence of an "actual case or controversy" would necessarily involve the existence of "competing interest[s]". The Ninth Circuit, however, in its zeal to ensure the primacy of endangered species protection, prevents any meaningful challenge to the Secretary's actions. By virtue of its decision, only those "persons" with a particular set of "competing interest[s]" will be allowed to bring a court challenge under the ESA. Thus, while environmental interest groups will be free to act to enforce the ESA to its maximum potential, those "persons" who bear the burden of the ESA regulation — property owners — will be at the mercy of the Department of the Interior.¹⁵ In the event that a species is mistakenly or improperly listed, the regulated parties who have an interest in correcting the mistake, will be forced to rely upon the non-regulated parties

¹⁴ As this Court noted, the ESA "encompasses a vast array of economic and social enterprises and endeavors." 115 S.Ct. at 2418.

¹⁵ "Those whom the agency regulates have the incentive to guard against any administrative attempt to impose a greater burden than that contemplated by Congress." *Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918, 922 (D.C. Cir. 1989).

who have no interest in (and, indeed, may be opposed to) correcting the mistake.¹⁶

The ability to protect one's interests in court historically has constituted a fundamental American right. Yet the Ninth Circuit's decision in this case abrogates that right for those who possess a "competing interest" with an endangered species. In other words, property owners will have to trust the Department of the Interior to administer the ESA in a manner which does not infringe upon their rights. Moreover, environmental groups who may oppose property development and growth will be able to use the ESA as a sword to prevent property owners' activities; the property owners, however, will be without the means to defend themselves. This result raises due process concerns and could not have been within the intent of Congress.

¹⁶ The NAHB and its affiliate, the Texas Capitol Area Builders Association, have filed just such an action. In *NAHB and TxCBA v. Babbitt, C.A.* No. 1:95CV01374 RMU (D.D.C. 1995), the district court has been asked to invalidate a final rule listing 2 species as endangered under the ESA which was promulgated without undergoing the requisite notice and comment process.

CONCLUSION

Therefore, for the reasons stated above, and in the Petition for Writ of Certiorari, the NAHB and the BILD pray that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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**BRIEF AMICUS CURIAE OF THE STATES OF
CALIFORNIA, ALASKA, ARIZONA, COLORADO,
KANSAS, MONTANA, SOUTH CAROLINA, TEXAS AND
UTAH IN SUPPORT OF PETITION FOR WRIT OF
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i.

QUESTIONS PRESENTED

The "citizen suit" provision of the Endangered Species Act of 1973 ("ESA"), Section 11(g)(1), 16 U.S.C. section 1540(g)(1), authorizes "any person" to commence a civil suit on his own behalf to enjoin the United States from violating the ESA or regulations issued thereunder. The questions presented are:

1. Whether the broad standing mandated by Congress in the citizen suit provision of the ESA is subject to a "zone of interests" test as a further prudential limitation on ESA standing.
2. If the "zone of interests" test applies, whether ESA standing is limited exclusively to litigants asserting an interest in preserving endangered species, as the Ninth Circuit held, and does not include litigants whose economic interests have been adversely affected by the Government's violations of the ESA.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF AMICI STATES	1
STATEMENT OF THE CASE	2
A. Nature of the Litigation and the Ninth Circuit's Decision	2
B. Impact of the Ninth Circuit's Decision on Administration of the ESA	4
REASONS WHY CERTIORARI SHOULD BE GRANTED	7
A. This Court Should Resolve An Inter-Circuit Conflict That Affects Not Just Enforcement of the ESA, But Also The Interpretation of Citizen Suit Provisions in Numerous Other Statutes	7
B. Even if A "Zone of Interests" Test Applies to ESA Standing, The Ninth Circuit So Misapplied That Test As To Necessitate Guidance From This Court On How Prudential Limitations May Be Applied In Citizen Suit Provisions	10

Table of Contents Cont.

	Page
ARGUMENT	11
I. THE NINTH CIRCUIT ERRED IN IMPOSING THE PRUDENTIAL "ZONE OF INTERESTS" TEST AS A FURTHER RESTRICTION UPON CITIZEN SUIT STANDING UNDER THE ESA	11
II. IF A "ZONE OF INTERESTS" TEST APPLIES TO ESA STANDING, THE NINTH CIRCUIT NONETHELESS MISAPPLIED AND MISCONSTRUED THAT TEST	15
CONCLUSION	18

TABLE OF AUTHORITIES

	Page
<u>Cases:</u>	
<i>Adarand Constructors, Inc. v. Pena</i> 115 S.Ct. 2097 (1995)	9
<i>Association of Data Processing Service Organizations v. Camp</i> 397 U.S. 150 (1970)	15, 17
<i>Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon</i> 115 S.Ct. 2407 (1995)	11
<i>Bacchus Imports, Ltd. v. Dias</i> 468 U.S. 263 (1984)	9
<i>Bennett v. Plenert</i> 63 F.3d 915 (9th Cir. 1995)	4, passim
<i>Block v. Community Nutrition Institute</i> 467 U.S. 340 (1984)	12
<i>Blue Chip Stamps v. Manor Drug Stores,</i> 421 U.S. 723 (1975)	14
<i>Bryant v. Yellen</i> 447 U.S. 352 (1980)	9
<i>Clarke v. Securities Industry Assn.</i> 479 U.S. 388 (1987)	10, passim
<i>Competitive Enterprise Institute v. National Highway Traffic Safety Administration</i> 901 F.2d 107 (D.C. Cir. 1990)	12

Table of Authorities Cont.

	Page
<i>Consumers Union v. Federal Trade Commission</i> 691 F.2d 575 (D.C. Cir. 1982) (en banc), <i>aff'd</i> , 463 U.S. 1216 (1983)	12
<i>Copper & Brass Fabricators v. Dept. of the Treasury</i> 679 F.2d 951 (D.C. Cir. 1982)	10
<i>Defenders of Wildlife v. Hodel</i> 851 F.2d 1035 (8th Cir. 1988), <i>opinion after remand</i> , 911 F.2d 117 (8th Cir. 1990), <i>rev'd on other grounds</i> , <i>Lujan v. Defenders of Wildlife</i> , 112 S.Ct. 2130 (1992)	7
<i>Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding and Dry Dock Co.</i> 115 S.Ct. 1278 (1995)	12, 13
<i>Family and Children's Center v. School City</i> 13 F.3d 1052 (7th Cir.), <i>cert. denied</i> , 115 S.Ct. 420 (1994)	12
<i>Gladstone, Realtors v. Village of Bellwood</i> 441 U.S. 91 (1979)	11, 12
<i>Gollust v. Mendell</i> 501 U.S. 115 (1991)	11
<i>Havens Realty Corp. v. Coleman</i> 455 U.S. 363 (1982)	11
<i>Humane Society of the United States v. Hodel</i> 840 F.2d 45 (D.C. Cir. 1988)	8
<i>Lujan v. Defenders of Wildlife</i> 112 S.Ct. 2130 (1992)	6, passim

Table of Authorities (Cont.)

	Page
<i>National Audubon Society v. Hester</i> 801 F.2d 405 (D.C. Cir. 1986)	8
<i>National Organization for Women v. Scheidler</i> 114 S.Ct. 798 (1994)	9
<i>Pacific Northwest Generating Co-op v. Brown</i> 38 F.3d 1058 (9th Cir. 1994)	14
<i>Sierra Club v. Morton</i> 405 U.S. 727 (1972)	14
<i>Swan View Coalition, Inc. v. Turner</i> 824 F.Supp. 923 (D.Mont. 1992)	12
<i>Trafficante v. Metropolitan Life Insur. Co.</i> 409 U.S. 205 (1972)	11
<i>Valley Forge College v. Americans United</i> 454 U.S. 464 (1982)	14, 15
<i>Warth v. Seldin</i> 422 U.S. 490 (1975)	11
<i>Wyoming v. Oklahoma</i> 112 S.Ct. 789 (1992)	9
<u>Codes, Statutes and Other Authorities:</u>	
15 U.S.C. § 2619	8
16 U.S.C. § 1532(13))	1
§ 1533	1
§ 1533(b)(2)	3

Table of Authorities (Cont.)

	Page
16 U.S.C. § 1533(b)(5)	6
§ 1536	1
§ 1536(a)(2)	3
§ 1540(g)(1)	i, 1, 2
30 U.S.C. § 1270 (Surface Mining Control and Reclamation Act)	8
33 U.S.C. § 1365 (Clean Water Act)	8
§ 1415(g) (Marine Protection, Research and Sanctuaries Act)	8
42 U.S.C. § 300j-8 (Safe Drinking Water Act)	8
§ 4911 (Noise Control Act of 1972)	8
§ 6305 (Energy Policy and Conservation Act)	8
§ 6972 (Solid Waste Disposal Act)	8
§ 7604 (Clean Air Act)	8
§ 9659 (Comprehensive Environmental Response, Compensation, and Liability Act)	8
§ 11046(a)(1) (Emergency Planning and Community Right-to-Know Act)	8
43 U.S.C. § 1349 (Outer Continental Shelf Lands Act)	8
50 C.F.R. § 402.14(g)(8)	3
§ 424.16	6
Administrative Procedure Act § 10	13, 16

Table of Authorities (Cont.)

	Page
Endangered Species Act of 1973	
§ 3(13)	1
§ 4	1, 3
§ 4(b)(2)	3, 6
§ 4(b)(5)	6
§ 7	1, passim
§ 7(a)(2)	3
§ 11(g)(1)	1, 2
 Securities Exchange Act of 1934	
§ 16(b)	11
 <u>Miscellaneous:</u>	
<i>2 A Legislative History of the Endangered Species Act of 1973, As Amended in 1976, 1977, 1978, 1979, and 1980 Cong. Research Serv.(1982)</i>	
pp. 813-814	6
p. 1218	6
 <i>Coyle, Standing of Third Parties to Challenge Administrative Agency Actions, 76 Calif. L. Rev. 1061 (1988)</i>	10
 <i>June, The Structure of Standing Requirements for Citizen Suits and the Scope of Congressional Power, 24 Env'tl. L. 761 (1994)</i>	10
 <i>Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 Suffolk U. L. Rev. 881 (1983)</i>	15
 <i>Sealand, Standing Behind Government-Subsidized Bipartisanship, 60 Geo. Wash. L. Rev. 1580 (1992)</i>	10

Table of Authorities (Cont.)

	Page
<i>Tribe, American Constitutional Law</i>	
§ 3.19 at 143 (2d Ed. 1988)	10
 <i>13A Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d, § 3531.13 at 69-73, ns. 8-10 (1984)</i>	8

No. 95-813

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

BRAD BENNETT, ET AL.
Petitioners,

v.

MARVIN PLENERT, ET AL.
Respondents.

BRIEF AMICUS CURIAE OF THE STATES OF
CALIFORNIA ET AL. IN SUPPORT OF PETITION
FOR WRIT OF CERTIORARI

INTEREST OF AMICI STATES

Amici States are vitally interested in the scope of standing under the citizen suit provision of the Endangered Species Act ("ESA"), Section 11(g)(1), 16 U.S.C. section 1540(g)(1). Because States are "persons" within the meaning of the ESA, see section 3(13), 16 U.S.C. section 1532(13), they are entitled to sue under the citizen suit provision. Consequently, the Ninth Circuit's narrow interpretation of citizen suit standing directly and adversely affects the States' ability to pursue judicial remedies for violations of the ESA and its regulations.

Amici States also have a strong interest in the implementation of the ESA provisions that were allegedly violated in this case, sections 4 and 7 of the ESA, 16 U.S.C. sections 1533, 1536. A great deal of land, resources, and productive economic activity within amici States is subject to regulation under sections 4 and 7 of the ESA. If litigants whose economic interests are harmed by the Government's violation of sections 4 and 7 lack standing to challenge those

ESA violations, then the economic well-being of States and their citizens will be diminished unlawfully without judicial recourse. Because so many endangered species are found within the geographic area of the Ninth Circuit, the decision below has a major impact on the overall administration of the ESA.

In sum, amici States have a strong interest in, and are directly affected by, the decision below. They respectfully submit this amicus brief in support of the petition for writ of certiorari.

STATEMENT OF THE CASE

A. Nature of the Litigation and the Ninth Circuit's Decision

Petitioners are ranchers and irrigation districts which receive water from a U.S. Bureau of Reclamation ("Bureau") water project, the Klamath Project, pursuant to contracts with the Bureau. See Appendix to Petition for Writ of Certiorari ("App.") 33-34, ¶15. As a result of a section 7 ESA consultation between the Bureau, as operator of the Klamath Project, and the U.S. Fish and Wildlife Service ("FWS"), water in two Klamath Project reservoirs that otherwise would have gone to petitioners was kept in the reservoirs, allegedly to avoid jeopardy to two endangered species of fish that live in the reservoirs. App. 37-40, ¶¶14-19, 21.

Petitioners filed suit against respondents, the Secretary of the Interior and FWS officials, pursuant to the citizen suit provision of the ESA.^{1/} Their complaint alleged that

1. Section 11(g)(1), 16 U.S.C. section 1540(g)(1) provides, in pertinent part:

"Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf --

(A) to enjoin any person, including the United States . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof" (Emphasis added)

respondents violated the ESA by:

(1) failing to use the "best scientific and commercial data available", as is required under section 7(a)(2) of the ESA,^{2/} in formulating the Biological Opinion for the Klamath Project and concluding that project water was needed to avoid jeopardy to the endangered fish, App. 37-41, ¶¶13, 20, 25, 28; and,

(2) by issuing a Biological Opinion for the endangered fish which, by setting forth hydrologic requirements in the reservoirs where the endangered fish live, implicitly determined "critical habitat" for the fish under section 4 of the ESA without considering the economic impacts of that critical habitat designation, as is required under section 4(b)(2) of the ESA. App. 40-42, ¶¶22, 31.^{3/}

The district court granted respondents' motion to dismiss for lack of standing, and the court of appeals affirmed.

2. Section 7(a)(2), 16 U.S.C. section 1536(a)(2) provides in pertinent part:

"Each federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical, unless such agency has been granted an exemption for such action . . . In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available." (Emphasis added).

See also 50 C.F.R. section 402.14(g)(8) ("in formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the [FWS] will use the best scientific and commercial data available"). (Emphasis added).

3. Section 4(b)(2), 16 U.S.C. section 1533(b)(2) provides, in pertinent part:

"The Secretary shall designate critical habitat . . . on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." (Emphasis added).

Bennett v. Plenert, 63 F.3d 915 (9th Cir. 1995) (App. 1-18).

In an opinion by Judge Reinhardt, the Ninth Circuit rejected petitioners' contention that the prudential "zone of interests" test had been rendered inapplicable by the broad grant of standing in the ESA citizen suit provision. App. 8. The court held that petitioners failed the "zone of interests" test because "only plaintiffs who allege an interest in the preservation of endangered species fall within the zone of interests protected by the ESA." App. 11. (Emphasis in original). The court thought that only species preservation interests satisfy the "zone" test because "[t]he overall purposes of the ESA are singularly devoted to the goal of ensuring species preservation; they do not embrace the economic and recreational interests that underlie the [petitioners'] challenge." App. 12-13. Because petitioners' wanted to use project water for irrigation and recreation, not species preservation, the court of appeals thought that petitioners were asserting a "competing interest" in the water that was "inconsistent with the [ESA's species preservation] purposes". App. 17. Finally, the court said that even though the ESA required the FWS to consider the economic impacts of designating critical habitat, Congress "did not intend impliedly to confer standing on every plaintiff who could conceivably claim that the failure to consider one of those factors adversely affected him." *Id.*

B. Impact of the Ninth Circuit's Decision on Administration of the ESA

The Ninth Circuit's decision essentially means that the only people who can sue under the citizen suit provision of the ESA to challenge a variety of ESA actions -- for example, listing species as threatened or endangered, designating land and resources as critical habitat, making section 7 jeopardy determinations, formulating reasonable and prudent alternatives and measures, etc. -- are litigants (most probably environmental organizations) who assert a species preservation

interest.^{4/} All other litigants who allege that the Government's violation of the ESA has harmed their economic, recreational, or any other interest besides species preservation (which includes almost all landowners and economic interests burdened by ESA regulation) have no citizen suit standing under the ESA.

This means that ESA enforcement in the Ninth Circuit is now completely one-sided. If one alleges that the Government has underregulated under the ESA because the Government failed to adequately protect endangered species, then one is asserting a species preservation interest, and one has standing. But if a litigant alleges that the Government overregulated based, for example, on the failure to use valid scientific data, or to consider economic impacts (as alleged in this case), then the interest being asserted is contrary to species preservation, and the courthouse door is closed for lack of standing.

This is a judicial prescription for regulatory failure. By removing legal checks on overregulation and permitting only suits alleging underregulation, the Ninth Circuit's one-sided standing rule will skew agency implementation of the ESA away from the type of implementation and decision-making that Congress intended.

It is inconceivable that Congress could have intended this result. In requiring the FWS to consider the economic impacts of designating critical habitat, who could Congress have intended to protect other than people like petitioners whose economic interests are adversely affected if economic impacts are not considered? The Ninth Circuit has essentially written out of the ESA the section 4(b)(2) duty to consider

4. Some economic interests may assert a derivative interest in species preservation for economic reasons; for example, fishermen may seek to protect endangered salmon so they can fish for salmon when the species recovers. But the usual advocates of species preservation interests under the ESA are environmental organizations, not economic interests. The Ninth Circuit also left open the possibility that some other standing rule might apply to parties "directly subject to . . . regulatory action", App. 6, n.2, without detailing how such "directly regulated" parties are identified.

economic impacts because the only parties who would enforce this ESA requirement are economic interests adversely affected by non-compliance with section 4(b)(2). Environmental organizations or persons championing a species protection objective are not about to complain about the failure to consider economic impacts in species-protective actions, like designation of critical habitat.

The economic impact requirement in section 4(b)(2) was added to the ESA in 1978 so that critical habitat would be designated more judiciously without paralyzing needed development projects. See 2 *A Legislative History of the Endangered Species Act of 1973, As Amended in 1976, 1977, 1978, 1979, and 1980* ("ESA Legis. Hist.") Cong. Research Serv. (1982) at 813-814 (colloquy between Rep. Buchanan and Bevill). Moreover, the ESA and regulations thereunder provide for notice, opportunity for comment, and public hearings on the designation of critical habitat. See section 4(b)(5), 16 U.S.C. section 1533(b)(5); 50 C.F.R. section 424.16. The evident intent of these provisions was to allow persons adversely affected by critical habitat designations to participate in the designation process. See e.g., *ESA Legis. Hist.* at 1218 (Conf. Rept. 1804, 95th Cong., 2d Sess.) These public participation rights, as well as the substantive requirement to consider economic impacts in designating critical habitat are meaningless if persons like petitioners have no standing to sue to enforce section 4(b)(2).

Finally, in the wake of the Ninth Circuit's decision it is unclear if there is anything left of "procedural injury" or so-called "footnote 7" standing under *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130 (1992). See 112 S.Ct. at 2142 n.7. Footnote 7 of *Lujan* indicates that litigants have standing to challenge procedural violations of the ESA provided they satisfy constitutional standing requirements and establish injury-in-fact to concrete interests. *Id.* However, because the Ninth Circuit superimposes its "zone of interests" test upon any "footnote 7" standing, see App. 5, n. 1, injury-in-fact to concrete economic or recreational interests (or any interest other than a species-preservation interest) disqualifies one from "footnote 7" standing.

The Ninth Circuit's decision drastically changes the landscape of ESA enforcement. The citizen suit provision is

now largely the exclusive domain of environmental plaintiffs, and ESA regulatory incentives are skewed in the direction of overregulation.

REASONS WHY CERTIORARI SHOULD BE GRANTED

A. This Court Should Resolve An Inter-Circuit Conflict That Affects Not Just Enforcement of the ESA, But Also The Interpretation of Citizen Suit Provisions in Numerous Other Statutes

Lujan v. Defenders of Wildlife, *supra*, 112 S.Ct. 2130, held that persons suing under the citizen suit provision of the ESA must satisfy constitutional requirements for standing. As *Lujan* explained, constitutional standing requirements must be superimposed upon any Congressional grant of standing to ensure that courts only decide Article III "cases" or "controversies", and avoid intruding on the separation of powers. *Id.*, 112 S.Ct. at 2143-2146.

This case presents the issue of prudential standing under the ESA which was left unresolved in *Lujan*. The issue here is: if a person suing under the citizen suit provision of the ESA satisfies constitutional standing requirements, can the courts nonetheless impose further prudential limitations on the broad standing mandated in the ESA citizen suit provision. Put another way, this case is the flip-side of the separation of powers issue in *Lujan*. If *Lujan* holds that Congress may not require the Courts to entertain anything less than an Article III "case" or "controversy", the issue here is whether the Ninth Circuit has intruded on Congress' prerogative to specify -- once constitutional Article III requirements are met -- those litigants who are authorized to enjoin violations of the ESA.

The courts of appeals have split on this important ESA prudential standing issue. The Eighth Circuit in *Defenders of Wildlife v. Hodel*, 851 F.2d 1035 (8th Cir. 1988), *opinion after remand*, 911 F.2d 117 (8th Cir. 1990), *rev'd on other grounds*, *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130 (1992) held that Congress' broad grant of standing in the citizen suit provision of the ESA left no room for further prudential limitations on standing, and that a litigant "need meet only the constitutional requirements for standing for . .

claims under the ESA." 851 F.2d at 1039. (Emphasis added).^{2/}

In contrast, the Ninth Circuit here held that "the ESA does not automatically confer standing on every plaintiff who satisfies constitutional requirements", App. 11, and that "notwithstanding the broad language of the citizen-suit provision", prudential standing limitations applied to ESA standing. App. 8.^{6/}

Whether and to what extent prudential standing limitations apply to citizen suit provisions is an issue that transcends the ESA. Citizen suit provisions are contained in numerous environmental, consumer, and civil rights provisions. See 13A Wright, Miller & Cooper, *Federal Practice and Procedure*: Jurisdiction 2d, §3531.13 at 69-73, ns. 8-10 (1984) (giving examples).^{2/} Consequently, the split in the circuits over whether and when prudential limitations may be imposed

5. Because this Court reversed in *Lujan* on grounds that environmental plaintiffs failed to satisfy constitutional standing requirements, there was no occasion to reach the Eighth Circuit's prudential standing ruling.

6. The District of Columbia Circuit also assumed, without much discussion, that the prudential "zone of interests" test applied to ESA standing when it upheld the standing of environmental plaintiffs. See *National Audubon Society v. Hester*, 801 F.2d 405, 407 n. 2 (D.C. Cir. 1986); *Humane Society of the United States v. Hodel*, 840 F.2d 45, 60-61 (D.C. Cir. 1988).

7. For example, almost every major environmental statute contains a citizen suit provision similar to that in this case. See Clean Water Act, 33 U.S.C. section 1365; Clean Air Act, 42 U.S.C. section 7604; Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. section 9659; Toxic Substances Control Act, 15 U.S.C. section 2619; Surface Mining Control and Reclamation Act, 30 U.S.C. section 1270; Marine Protection, Research and Sanctuaries Act, 33 U.S.C. section 1415(g); Safe Drinking Water Act, 42 U.S.C. section 300j-8; Noise Control Act of 1972, 42 U.S.C. section 4911; Energy Policy and Conservation Act, 42 U.S.C. section 6305, Outer Continental Shelf Lands Act, 43 U.S.C. section 1349, Solid Waste Disposal Act, 42 U.S.C. section 6972; Emergency Planning and Community Right-to-Know Act, 42 U.S.C. section 11046(a)(1).

upon ESA citizen suit standing has major implications for many of the Nation's laws.

The prudential standing issue in this case is cleanly presented because petitioners clearly satisfy constitutional standing requirements. Although the Ninth Circuit did not expressly so rule, it implied as much by stating: "The issue before us is not whether the plaintiffs have satisfied the constitutional standing requirements but whether their action is precluded by the zone of interests test, the prudential standing limitation". App. 4-5. Since the case was disposed of on motion to dismiss, petitioners' burden of establishing constitutional standing at the pleading stage is a modest one. See *National Organization for Women v. Scheidler*, 114 S.Ct. 798, 803 (1994).

Petitioners clearly suffered "injury-in-fact" because water that otherwise would have gone to them under their contracts was reallocated to the endangered fish pursuant to the ESA. Indeed, the Ninth Circuit's characterization of petitioners' interests as being in direct conflict with the interests of the endangered fish, see App. 16, is essentially a restatement of the "injury-in-fact" that petitioners suffered as a result of the Section 7 consultation. The causation element of constitutional standing is satisfied because the alleged failure of federal officials to comply with the ESA resulted in the particular Biological Opinion and Section 7 consultation that brought about the reallocation of project water from petitioners to the fish. Finally, redressability is satisfied because setting aside the Biological Opinion and enjoining federal officials from failing to comply with sections 4 and 7 would restore petitioners to the priority for project water which they otherwise had under their contracts. Petitioners' economic injuries here are much more direct and immediate than the economic injuries that have afforded standing in other cases.^{8/}

Consequently, the important issue of prudential

8. Compare *Bryant v. Yellen*, 447 U.S. 352, 366-368 (1980); *Wyoming v. Oklahoma*, 112 S.Ct. 789, 797-798 (1992); *Adarand Constructors, Inc. v. Peña*, 115 S.Ct. 2097, 2104-2105 (1995); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 267 (1984).

standing under the ESA, which was unresolved in *Lujan*, upon which the circuits have divided, and which has major implications for citizen suit provisions in numerous other statutes, merits this Court's attention.

B. Even if A "Zone of Interests" Test Applies to ESA Standing, The Ninth Circuit So Misapplied That Test As To Necessitate Guidance From This Court On How Prudential Limitations May Be Applied In Citizen Suit Provisions

Assuming arguendo that a "zone of interests" test applies to citizen suit provisions, the applicability of the "zone" test in "non-APA" cases like this (i.e., where a regulatory statute other than the Administrative Procedure Act ("APA") expressly authorizes judicial review), is an area largely uncharted by this Court. *Clarke v. Securities Industry Assn.*, 479 U.S. 388 (1987) is ambiguous as to whether and what extent a "zone" test, or something like it, may be appropriate in non-APA cases. See *Id.* at 400 n.16. Commentators have also noted the uncertainty on this score.^{9/}

The Ninth Circuit essentially converted the "zone of interests" test into a "statutory purpose" test which uses an oversimplified definition of a statute's "purpose" to deny

9. See Tribe, *American Constitutional Law*, §3.19 at 143 (2d Ed. 1988) (noting that in the non-APA context, "the 'zone of interests' test is a doctrine of uneven application and uncertain meaning."); Coyle, *Standing of Third Parties to Challenge Administrative Agency Actions*, 76 Calif. L. Rev. 1061, 1077 (1988) (noting "nagging questions over applicability" of the "zone" test outside the APA context); Sealander, *Standing Behind Government-Subsidized Bipartisanship*, 60 Geo. Wash. L. Rev. 1580, 1592 (1992) ("confusion exists as to the applicability of the 'zone of interests' test outside of the APA context"); June, *The Structure of Standing Requirements for Citizen Suits and the Scope of Congressional Power*, 24 Envtl. L. 761, 779-785 (1994). See also *Copper & Brass Fabricators v. Dept. of the Treasury*, 679 F.2d 951, 954 (D.C. Cir. 1982) (Ginsburg, J., concurring) ("The absence of a cogent explanation by the Supreme Court of the purpose, scope, or proper application of the 'zone of interests' test has bred confusion and divergent approaches among lower federal courts.")

standing to litigants whose claims purportedly conflict with this statutory purpose. Because the "zone" test threatens to evolve into something it was never intended to be, the Court should use this case to clarify the proper use of the "zone" test in non-APA cases.

Moreover, if the Ninth Circuit is right that economic injury is not within the ESA's "zone of interests", then this Court should not have reached the merits last term in *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 115 S.Ct. 2407 (1995). In *Sweet Home*, landowners and timber harvesting interests challenged the ESA's "harm" regulation alleging that the regulation "injured them economically." *Id.* at 2410. Consequently, the only basis for ESA standing in *Sweet Home* was economic injury like that of petitioners in this case.

ARGUMENT

I. **THE NINTH CIRCUIT ERRED IN IMPOSING THE PRUDENTIAL "ZONE OF INTERESTS" TEST AS A FURTHER RESTRICTION UPON CITIZEN SUIT STANDING UNDER THE ESA**

It is clear that "Congress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one 'who otherwise would be barred by prudential standing rules.'" *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979), quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Applying this principle, the Court has held that the broad grant of standing in Section 812 of the Fair Housing Act of 1968 "extend[s] to the full limit of Art. III", *Gladstone, supra*, 441 U.S. at 103, n.9, and that "courts accordingly lack the authority to create prudential barriers to standing in suits brought under that section." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982). See also *Trafficante v. Metropolitan Life Insur. Co.*, 409 U.S. 205, 209 (1972). More recently, in *Gollust v. Mendell*, 501 U.S. 115 (1991), the Court refused to engraft prudential limitations upon standing to sue for insider trading under Section 16(b) of the Securities Exchange Act of 1934, stating: "in light of the congressional policy of lenient standing, we will not read any

further condition into the statute, beyond the requirement that a §16(b) plaintiff maintain a financial interest in the outcome of the litigation sufficient to . . . avoid constitutional standing difficulties." Lower courts have also held that broad statutory authorizations of suit eliminate prudential standing limitations.^{10/}

The Ninth Circuit's imposition of prudential limitations on ESA standing was erroneous for at least three reasons. First, whether citizen suit provisions are subject to further prudential limitations is a question of congressional intent. See *Clarke, supra*, 479 U.S. at 400. Consequently, courts should use the traditional indicia of congressional intent, like the words of the statute authorizing judicial review, see *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding and Dry Dock Co.*, 115 S.Ct. 1278, 1283-1284 (1995), the legislative history of the relevant laws, *Gladstone, supra*, 441 U.S. at 105-107, and the structure of the legislation, *Block v. Community Nutrition Institute*, 467 U.S. 340, 345-348 (1984), 352 to answer the congressional intent question. Here, the Ninth Circuit failed to undertake any serious inquiry into congressional intent, and automatically assumed that the

10. See *Family and Children's Center v. School City*, 13 F.3d 1052, 1061 (7th Cir.), *cert. denied*, 115 S.Ct. 420 (1994) (Individuals With Disabilities Act provision authorizing suit by "any person aggrieved" meant that litigants "need not run the gauntlet of prudential standing tests; satisfying Art. III is enough"); *Competitive Enterprise Institute v. National Highway Traffic Safety Administration*, 901 F.2d 107, 118-119 (D.C. Cir. 1990) (Energy Policy and Conservation Act ("EPCA") provision authorizing suit by "any person who may be adversely affected by any rule" eliminated prudential standing limitations); *Consumers Union v. Federal Trade Commission*, 691 F.2d 575, 576 (D.C. Cir. 1982) (*en banc*), *aff'd*, 463 U.S. 1216 (1983) (Federal Trade Commission Improvements Act provision authorizing "any interested party" to challenge the congressional veto provisions of the Act was "intended to permit standing . . . to the full extent permitted by Article III."); *Swan View Coalition, Inc. v. Turner*, 824 F.Supp. 923, 928-929 (D.Mont. 1992) (prudential standing limitations do not apply to ESA, and plaintiff suing under the citizen suit provision of the ESA "need only meet the constitutional requirements for standing in order to bring their claim under the ESA").

prudential "zone of interests" test applied to the ESA.

Because the "zone of interests" test was developed as a gloss on the phrase "aggrieved by agency action within the meaning of a relevant statute" in section 10 of the APA, *Clarke, supra*, 479 U.S. at 394-397, there is no reason why it should automatically apply to the altogether different language of the ESA which grants "any person" standing to enjoin violations of "any provision" of the ESA.^{11/} *Clarke* emphasized that the "zone of interests" test "is not a test of universal application". 479 U.S. at 400, n. 16. The Ninth Circuit's transfer of the "zone" test from its original APA setting to a non-APA context, without any serious analysis of congressional intent, is contrary to this Court's exposition of the "zone" test, and wrongly intrudes on Congress' power to specify who it wants to enforce its statutes.

Second, there is no justiciability rationale for imposing prudential standing limitations in this case. Petitioners were not denied standing because they are unlikely to adequately present the disputed issues in a sharply focused adversarial context. Because petitioners' water rights were directly and adversely affected by the Section 7 consultation and FWS Biological Opinion, petitioners were in the best position to ensure the requisite adverseness. The Ninth Circuit's apparent belief that the Bureau of Reclamation, not petitioners, is a more appropriate plaintiff, see App. 6, actually selects the least appropriate party. It is unrealistic to think that the Bureau can sue the FWS, a fellow agency within the Department of Interior under the common control of the Secretary of the Interior, a named defendant in the action. This is hardly an alignment of parties guaranteeing adversity of interest and avoidance of collusion. Moreover, such a party alignment "would put the federal courts into the regular business of deciding intrabranch and intraagency policy disputes -- a role that would be most inappropriate." *Director, Office of Workers' Compensation Programs, supra*, 115 S.Ct. at

11. Given the plain meaning of "any person", the Ninth Circuit should have started with the presumption that Congress intended to abrogate prudential limitations on ESA citizen suit standing, and then proceeded to determine if there was any evidence of contrary intent.

1284-1285. (Emphasis added).

While prudential limitations may be justified in certain cases for judicial management reasons, like avoiding difficult problems of proof when distant purchasers have standing, and minimizing the opportunity for vexatious litigation, see *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737-749 (1975), none of those considerations apply here.

Nor are prudential limits justified because petitioners are asserting the interests of third parties. See *Valley Forge College v. Americans United*, 454 U.S. 464, 474 (1982). Instead, petitioners are asserting that their water and contract rights -- rights personal to them -- have been adversely affected by the challenged regulatory action.

The distinction between plaintiffs who are and are not the "object" of the regulatory action at issue, see *Lujan, supra*, 112 S.Ct. 2137, is also no basis for imposing prudential limitations. The "object" of ESA regulation is the Klamath Project and its operations upon which ESA constraints were imposed. Because the Bureau is not an appropriate party to sue the FWS, petitioners, who derive their water from the Project, are the real "object" of the ESA regulation. Presumptively, they should have standing.

Alternatively, if the "object" of ESA regulation is taken to be the species itself,^{12/} then all other parties, be they environmental or economic interests, have "derivative" standing. There is no reason, at least in terms of the "object" of regulation, why "derivative" environmental interests should have any greater standing than "derivative" economic interests.

12. Outside of Justice Douglas's dissent in *Sierra Club v. Morton*, 405 U.S. 727 (1972), see *id.* at 741-742, and a few commentators, the notion that species should have standing has not been widely accepted. The Ninth Circuit, however, comes close in this case with its notion that the touchstone for standing should be whether the interests of a litigant conflict or are congruent with the interests of the species. See App. 16; See also *Pacific Northwest Generating Co-op v. Brown*, 38 F.3d 1058, 1063 (9th Cir. 1994) (in ESA case, describing district court's rationale that endangered salmon were "in effect, a ward of the court, or like a ward of the court, and concluding that all plaintiffs were disabled from representing the salmon by a conflict of their interests with the salmon's").

Finally, there is no separation of powers justification for prudential limitations in this case. Petitioners are not asserting a "generalized grievance", which is "pervasively shared and most appropriately addressed in the representative branches." *Valley Forge College, supra*, 454 U.S. at 475; see also *Lujan, supra*, 112 S.Ct. at 2143-2146. Indeed, this case is the reverse of the "generalized grievance" situation. Here, the burdens of regulation are disproportionately concentrated upon persons like petitioners, and the environmental benefits of the regulation are broadly diffused. Yet, standing is accorded to diffuse beneficiaries who are free to allege claims of underregulation, but denied to those who bear the concentrated burdens of regulation and who seek to allege claims of overregulation. Standing is justified here both to protect minority interests that disproportionately bear regulatory burdens, see generally Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 894-896 (1983), and to avoid dysfunctional incentives towards "overregulation."

In sum, the Ninth Circuit wrongly imposed prudential limitations on citizen suit standing without analyzing evidence of congressional intent, and without any justiciability or separation of powers justification for doing so. Instead, the Ninth Circuit substituted its own notion of what ESA policies should be advanced and by whom, thereby undermining Congress' prerogative to control standing as it sees fit through legislation.

II. IF A "ZONE OF INTERESTS" TEST APPLIES TO ESA STANDING, THE NINTH CIRCUIT NONETHELESS MISAPPLIED AND MISCONSTRUED THAT TEST

The Ninth Circuit misapplied the "zone of interests" test in several ways. First, the "zone" test accords standing to litigants whose interests are "arguably within the zone of interests to be protected or regulated by the statute . . . in question." *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 153 (1970) (emphasis added); see also *Clarke, supra*, 479 U.S. at 396. The Ninth Circuit ignored the "regulation" part of the "zone" test, and required that a

litigant's interest be "protected" by the relevant statute. This is contrary to the admonitions in *Clarke* that one need not show an "indication of congressional purpose to benefit the would-be plaintiff", *id.*, 479 U.S. at 399-400; that the "zone" test is "not meant to be especially demanding", *id.* at 399; and that to satisfy the test a litigant need only demonstrate a "plausible relationship" to the policies underlying the relevant statute. *Id.* at 403. (Emphasis added). Since the "zone" test is a gloss on section 10 of the APA which grants standing to persons "aggrieved by agency action", the "zone" test includes not just those benefitted by a statute, but the "aggrieved" who feel the bite of a regulatory program. Consequently, litigants, like petitioners here, who pay the costs of regulatory compliance fall within the zone of interests "regulated" by the statute. The "zone" test was never intended to be applied as narrowly as the Ninth Circuit applied it in this case.

Even if one construes the "zone" test to only include interests benefitted by, rather than burdened by, the ESA, petitioners are still clearly within the "zone." The substantive requirement to consider the economic impacts of critical habitat designation, and the right of the public to participate in the critical habitat designation rulemaking, can only have been intended to benefit people like petitioners. Who else could Congress have intended to benefit other than landowners and economic interests that bear the economic burdens of critical habitat designations? Therefore, petitioners satisfy even the most stringent "zone" test.

Second, the Ninth Circuit's notion that petitioners' interests are "inconsistent with the [ESA's] purposes", App. 17, cannot withstand scrutiny. The purpose of the ESA was not to protect species through arbitrary decision-making which lacks a valid scientific basis. Nor was the purpose of the ESA to designate critical habitat without considering economic impacts. Both of these requirements -- of using good science and considering economic impacts -- go to the heart and integrity of governmental decision-making (and species-protection efforts) under the ESA. Therefore, petitioners' allegations that these statutory provisions were violated is consistent with and furthers the purposes of the ESA, contrary to the Ninth Circuit's conclusion.

The fact that petitioners are in competition with the

endangered fish for water is not a basis for denying standing. Competitors of regulated industries or entities have interests contrary to those of the regulated party but have long had standing under the "zone of interests" test. See e.g., *Camp*, *supra*, 307 U.S. 150.

The Ninth Circuit's mistake was in using an oversimplified definition of the "purpose" of the ESA as a litmus test for standing. Interests, for purposes of the "zone" test, have to be defined and evaluated in relation to the particular statutory provisions and the relevant legislative intent behind them, not some judicial distillation of the (single) "purpose" of an act. "[I]t is not unusual for legislation to contain diverse purposes that must be reconciled, and the most reliable guide for that task is the enacted text." *City of Chicago v. Environmental Defense Fund*, 114 S.Ct. 1588, 1594 (1994). Consequently, the touchstone for standing should not be a court's definition of a statute's "purpose", and whether certain litigants will or will not further that purpose.

Insofar as *Clarke*, *supra*, referred to certain interests as not being within the zone of interests if they are "so marginally related to or inconsistent with the purposes implicit in the statute", 479 U.S. at 399, the Court was simply saying that the impact on plaintiffs may not be so attenuated and indirect, (i.e., "[i]n cases where the plaintiff is not itself the subject of the contested regulatory action", *id.*), and that the interests being asserted cannot be so far removed and remote from the concerns of the statute that "it cannot reasonably be assumed that Congress intended to permit the suit." *Id.* That is not the case here. The adverse economic impacts on petitioners is direct and immediate. Moreover, when Congress crafted the requirements to use the best scientific data and to consider economic impacts in administering the ESA, it undoubtedly had in mind the interests of people like petitioners who bear the burdens of ESA regulation.

The ranchers and farmers who depend on Klamath Project water will do their part to fulfill the Nation's commitment to protect endangered species. But they should have access to the courts when the impositions upon them go beyond the law.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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Supreme Court, U. S.
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In The
Supreme Court of the United States

October Term, 1995

BRAD BENNETT, et al.,

Petitioners,

v.

MARVIN PLENERT, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF AMICUS CURIAE OF THE ASSOCIATION
OF CALIFORNIA WATER AGENCIES, THE STATE
WATER CONTRACTORS, AND THE CENTRAL
VALLEY PROJECT WATER ASSOCIATION IN
SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The "Citizens Suit" provision of the Endangered Species Act of 1973 (16 U.S.C. § 1540(g)(1)) provides "any person" may commence a civil suit on his own behalf to enjoin the United States from violating the provisions of the Act or regulations issued thereunder. The questions presented are:

1. Whether standing under the Citizens Suit provisions of the Endangered Species Act is subject to a zone of interest test as a further, judicially imposed, prudential limitation on standing;
2. If standing to sue under the Endangered Species Act is subject to prudential limitations, whether those limitations restrict standing to litigants who assert an interest in the preservation of endangered species to challenge government conduct alleged to violate the terms of the Act.

TABLE OF CONTENTS

	Page(s)
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
DECISION BELOW	1
INTEREST OF AMICI	1
STATEMENT OF THE CASE	5
ARGUMENT	8
I. APPLICATION OF THE ZONE OF INTEREST TEST FRUSTRATES CONGRESSIONAL POL- ICY CONCERNING DEFERENCE TO STATE REGULATION OF WATER RESOURCES	8
II. THIS CASE PRESENTS AN OPPORTUNITY FOR THIS COURT TO CLARIFY THE ZONE OF INTERESTS TEST	10
III. PRUDENTIAL STANDING IS INAPPLICA- BLE TO PETITIONERS WHO STAND IN PLACE OF THE AGENCY DIRECTLY REG- ULATED	14
IV. THE COURT OF APPEALS' APPLICATION OF THE ZONE OF INTEREST TEST IMPLI- CATES PUBLIC POLICY CONCERNING ACCESS TO THE COURTS	16
CONCLUSION	18

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Association of Data Processing Service Organizations, Inc. v. Camp</i> , 397 U.S. 150 (1970)	10
<i>Babbitt v. Sweet Home Ch. of Commun. for Great Or.</i> , ___ U.S. ___, 115 S. Ct. 2407 (1995)	11
<i>Bennett v. Plenert</i> , 63 F.3d 915 (9th Cir. 1995)	1, 11
<i>California Motor Transport Co. v. Trucking Unlimited</i> , 404 U.S. 508 (1972)	16
<i>California v. United States</i> , 438 U.S. 645 (1978)	3
<i>Central Arizona Water Conservation District v. U.S. E.P.A.</i> , 990 F.2d 1531 (9th Cir. 1993)	11
<i>Clarke v. Securities Industry Association</i> , 479 U.S. 388 (1987)	10, 14
<i>Ickes v. Fox</i> , 300 U.S. 82 (1937)	15
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992)	15
<i>PUD No. 1 v. Washington Dept. of Ecology</i> , ___ U.S. ___, 114 S. Ct. 1900 (1994)	9
<i>Rodriguez v. U.S.</i> , 480 U.S. 522 (1987)	11
<i>United States v. Alpine Land and Reservoir Co.</i> , 503 F. Supp. 877 (D. Nev. 1980)	15
STATUTES	
50 C.F.R. § 17.11	3
16 U.S.C. § 1531	3
16 U.S.C. § 1531(c)(2)	3, 9
16 U.S.C. § 1533(b)(2)	3, 7, 12, 14

TABLE OF AUTHORITIES – Continued

	Page(s)
16 U.S.C. § 1536(a)(2).....	6
16 U.S.C. § 1540(g)(1).....	6, 17
33 U.S.C. § 1251.....	9
43 U.S.C. § 372.....	15
43 U.S.C. § 383.....	9
California Water Code § 1243.....	3
California Water Code § 1243.5	3
California Water Code § 1257.5	3
OTHER AUTHORITIES	
H.R. Rep. No. 1625, 95th Cong., 2nd Sess. 14 (1978) reprinted in U.S.C.C.A.N.	13
<i>Recording Indicates Rancher, Not Agents, Aggressive</i> The Idaho Statesman, Sept. 14, 1995	16
<i>This Land is Whose Land?</i> , Time, Oct. 23, 1995, at 68-71.....	16
United States Supreme Court Rules, Rule 37.2.....	1
<i>Unrest in the West</i> , Time, Oct. 23, 1995, at 52-66.....	16

DECISION BELOW

The decision of the United States Court of Appeals for the Ninth Circuit, *Bennett v. Plenert*, is reported at 63 F.3d 915 (9th Cir. 1995).

INTEREST OF AMICI

Pursuant to Rule 37.2 of the Rules of the Supreme Court of the United States, the Association of California Water Agencies, the State Water Contractors, and the Central Valley Project Water Association respectfully submit this brief *amicus curiae* in support of Petition for Writ of Certiorari. Consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

The people of the State of California are highly dependent upon an intricate network of highly developed water projects to convey water to their cities and farms. This dependence arises from a geographical imbalance of supply and demand. Roughly 75 percent of California's water resources are found north of the Sacramento/San Joaquin River Delta, while approximately 75 percent of the urban and agricultural water demand within California occurs south of the Delta. To deal with this geographical imbalance, both the state and federal governments have constructed water projects which transfer water from where it is found to where it is consumptively used. Together, the State Water Project, an element of the State Water Development System ("State Water System"), and federal Central Valley Project provide water to more than two-thirds of California's urban population and the vast

majority of its farmland. The Sacramento/San Joaquin River Delta is a critical link in the conveyance of California's water from the north to the south.

Amicus, Association of California Water Agencies ("ACWA"), is a non-profit incorporated association of 420 local public agencies which supply and manage California water resources. These agencies supply water, at the wholesale or retail level, or both, to nearly all urban households in California and to more than 8 million acres of farmland. ACWA members also provide flood control for millions of Californians and manage many of the State's groundwater basins. Many of the members of ACWA receive their water supply directly or indirectly from the State Water System, from the federal Central Valley Project, or from the Colorado River Basin Project.

Amicus, State Water Contractors ("Contractors"), is a non-profit incorporated association comprised of 27 public agencies formed under the laws of the State of California. Each of the agencies holds a contract with the State of California to receive water from the State Water System. By means of these contracts, the State Water System supplies water to some 21 million urban residents and nearly a million acres of farmland.

Amicus, Central Valley Project Water Association ("CVPWA"), is a non-profit incorporated association comprised of 80 public agencies formed under the laws of the State of California. Each of the agencies holds a contract with the United States Department of Interior, Bureau of Reclamation, to receive water from the federal Central Valley Project. By means of these contracts, the Central Valley Project provides 4 million households and

3 million acres of farmland with all, or a portion, of their water supply.

Historically, the balance between distribution for consumptive use by water users, on the one hand, and the allocation of water for environmental maintenance or enhancement, on the other, was determined by provisions of water right permits or licenses issued by the State of California. *See California v. United States*, 438 U.S. 645 (1978); *see also*, California Water Code §§ 1243, 1243.5 and 1257.5. More recently, however, the operations of water projects, particularly, the State Water System, the Central Valley Project, and the Colorado River Basin Project, and thus, the balance between consumptive and environmental water use, have been significantly affected by directives of the United States Fish and Wildlife Service and National Marine Fisheries Service under authority of the federal Endangered Species Act ("Act"), 16 U.S.C. § 1531 *et seq.* This fundamental shift in regulatory authority results from the fact that the Sacramento/San Joaquin River Delta and the Colorado River provide habitat for numerous aquatic species listed under the Act.

The winter-run Chinook salmon, an anadromous species listed as endangered, 50 C.F.R. § 17.11, uses the Delta as part of its migration corridor to and from the Pacific Ocean. The Delta smelt, listed as a threatened species, *id.*, is largely resident within the Delta year round. Four native fish species that inhabit the Colorado River are federally listed as endangered: the Colorado squaw fish, the humpback chub, the bonytail, and the razorback sucker. *Id.* Based upon the conclusions of the United States Fish and Wildlife Service and the National Marine

Fisheries Service regarding requirements for the preservation of these species, the operational standards and criteria for water projects have been radically altered. As a result of these changes, the water supply available to California's cities and farms has been significantly reduced, and the ability of *Amici's* members to meet the water supply needs of their constituents has been directly impaired.

California also provides habitat for many terrestrial species listed as threatened or endangered under the Act. Actions taken to protect these species affect the operations of agencies which comprise *Amici*. In the San Joaquin Valley of California, routine activities to maintain water conveyance facilities are disrupted or precluded because those activities may harm the habitat of the San Joaquin kit fox or Tipton kangaroo rat. Similar activities are affected in the Sacramento Valley of California in order to prevent harm to the giant garter snake.

In addition to receiving water from the State Water System, the Central Valley Project, or the Colorado River Basin Project, many member agencies of ACWA, CVPWA, or the Contractors have constructed, or are constructing, their own water projects. Regulation under the Act has significantly affected these efforts. For example, to provide habitat for the least Bells vireo and other listed species, Metropolitan Water District of Southern California, a member of ACWA and the State Water Contractors, was required to purchase and set aside substantial acreage in connection with its effort to construct Domenigoni Valley Reservoir. Contra Costa County Water District, a member of ACWA and the CVPWA, also was required to create an endangered species reserve in connection with

its efforts to construct its Los Vaqueros Reservoir Project in the Sacramento/San Joaquin Delta.

As of June, 1993, California provided habitat to 109 species listed as endangered or threatened pursuant to the Act and 48 species proposed for listing. Regardless of the region in which a member agency of either ACWA, the Contractors, or CVPWA finds itself, its water supply or operations are likely to be affected by efforts undertaken to protect one of these species.

STATEMENT OF THE CASE

Petitioners are ranchers and irrigation districts which receive water from the Klamath Project, operated by the Bureau of Reclamation ("Bureau"). See, Complaint, ¶¶ 5 and 9. As a result of a consultation between the Bureau and the United States Fish and Wildlife Service pursuant to Section 7 of the Act, water in two Klamath Project reservoirs that otherwise would have been allocated to Petitioners was maintained in the reservoirs, purportedly to avoid jeopardy to the Lost River sucker and the short-nose sucker, which were listed as endangered in 1988. Complaint, ¶¶ 10, 14-19, 21.

Petitioners filed suit against Respondents, the Secretary of Interior, and Fish and Wildlife officials pursuant

to the Citizens Suit provision of the Act.¹ It was alleged in their Complaint that Respondents violated the Act by: (1) determining under Section 7(a)(2) of the Act² that the proposed operation of the project would result in jeopardy to the fish, and that restrictions should be imposed on withdrawals for irrigation, without data to support those conclusions and in the face of information suggesting that fish populations were stable;³ and (2) by issuing a biological opinion which, by setting forth hydrologic requirements in reservoirs where the suckers live, implicitly determined "critical habitat" for the fish under Section 4 of the Act without considering the economic

¹ Section 11(g)(1), 16 U.S.C. § 1540(g)(1) provides, in pertinent part:

Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf

(A) to enjoin any person, including the United States . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof.

² Section 7(a)(2), 16 U.S.C. § 1536(a)(2) provides, in pertinent part:

Each Federal agency shall, in consultation with and with the assistance of the Secretary, ensure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical, unless such agency has been granted an exemption for such action. . . . In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

³ Complaint ¶¶ 9-21, 24-29.

impacts of that critical habitat designation, as required under Section 4(b)(2) of the Act. Complaint, ¶¶ 22, 31.⁴

The United States District Court for the District of Oregon granted Respondents' Motion to Dismiss for lack of prudential standing, and the United States Court of Appeals for the Ninth Circuit, in an opinion by Judge Reinhardt, affirmed.

In its opinion, the Court of Appeals rejected Petitioners' contention that the prudential "zone of interest" test was rendered inapplicable by the Act's Citizens Suit provision. 63 F.3d at 918. The Court held that Petitioners failed the "zone of interest" test because "only plaintiffs who allege an interest in the *preservation* of endangered species fall within the zone of interests protected by the ESA." *Id.* at 919 (emphasis in original). The Court concluded that only species preservation interests satisfy the "zone" test because "the overall purposes of the ESA are singularly devoted to the goal of ensuring species preservation; they do not embrace the economic and recreational interests that underlie the [Petitioners'] challenge." *Id.* at 920. Because Petitioners use project water for irrigation and recreation, not species preservation, the Court of Appeals concluded that Petitioners were asserting a "competing interest" in the water that

⁴ Section 4(b)(2), 16 U.S.C. § 1533(b)(2) provides, in pertinent part:

The Secretary shall designate critical habitat . . . on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat.

was "inconsistent with the Act's purposes." *Id.* at 921. Finally, the Court concluded that, notwithstanding the mandate of Section 4(b)(2) requiring the Secretary to consider the economic impacts of designating critical habitat, Congress "did not intend impliedly to confer standing on every plaintiff who could conceivably claim that the failure to consider one of those factors adversely affected him." *Id.*

ARGUMENT

I. APPLICATION OF THE ZONE OF INTEREST TEST FRUSTRATES CONGRESSIONAL POLICY CONCERNING DEFERENCE TO STATE REGULATION OF WATER RESOURCES.

Embodied in numerous federal statutory schemes is a deference to regulation of water resources by the states. This deference is stated expressly in Section 8 of the Reclamation Act of 1902, which provides, in pertinent part:

Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

43 U.S.C. § 383. See also, *PUD No. 1 v. Washington Dept. of Ecology*, ___ U.S. ___, 114 S. Ct. 1900, 1912-1914 (1994) (Clean Water Act, 33 U.S.C. § 1251 *et seq.*, to be administered so as to avoid interference with state's water allocations).

Similar deference was expressed by Congress when in 1982 it amended the Endangered Species Act. Public Law 97-304 § 9(a) (96 Stat. 1426). Section 2(c)(2) of the Act provides:

It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.

16 U.S.C. § 1531(c)(2).

This 1982 amendment to the Act granted to local water agencies, such as Horsefly Irrigation District and Lingell Valley Irrigation District, special status in obtaining federal cooperation in resolving water resource management issues with minimal conflict with the Act. Thus, these agencies have a unique interest that is entitled to protection under the terms of the Act, and application to such agencies of prudential standing principles frustrates the Congressional policy of promoting cooperation between federal agencies and local agencies to resolve such issues.

II. THIS CASE PRESENTS AN OPPORTUNITY FOR THIS COURT TO CLARIFY THE ZONE OF INTERESTS TEST.

The "zone of interest" test was first enunciated as a standing requirement in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). In that case, the Court held that a plaintiff seeking judicial review under the Administrative Procedure Act must demonstrate that "the interest sought to be protected by [the litigant was] arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 153. The Court's next expression concerning the limits of this prudential doctrine was in *Clarke v. Securities Industry Association*, 479 U.S. 388, 399 (1987), in which the Court observed the zone of interest test "is not meant to be especially demanding." The Court explained:

In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.

Id.

This petition presents an opportunity to address an important question of federal law which has not been, but should be, settled by this Court. That is, in the application of the zone of interest test, should a court consider an act of Congress as a whole, including the means and limitations specified by the Congress in the various sections of the Act, or should a court focus exclusively on

what it discerns as the primary purpose of the act and limit the zone of interest to furtherance of that purpose? Compare, *Central Arizona Water Conservation District v. U.S. E.P.A.*, 990 F.2d 1531, 1538-1539 (9th Cir. 1993), *cert. den.*, ___ U.S. ___, 114 S. Ct. 94 (1993) with *Bennett v. Plenert*, 63 F.3d at 919-922.

This Court has warned lower courts before of the dangers of focusing solely on the broad purpose of a statute and ignoring its individual sections. In *Rodriguez v. U.S.*, 480 U.S. 522, 525-526 (1987) (per curiam) this Court explained:

[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law. (emphasis in original)⁵

The Court of Appeals held in this case "that only plaintiffs who allege an interest in the preservation of

⁵ More recently, in dissent in *Babbitt v. Sweet Home Ch. of Commun. for Great Or.*, ___ U.S. ___, 115 S. Ct. 2407, 2426 (1995), Justice Scalia noted:

Deduction from the "broad purpose" of a statute begs the question if it is used to decide by what *means* (and hence to what *length*) Congress pursued that purpose; to get the right answer to that question there is no substitute for the hard job (or in this case, the quite simple one) of reading the whole text. "The act must do everything necessary to achieve its broad purpose" is the slogan of the enthusiast, not the analytical tool of the arbiter.

endangered species fall within the zone of interests protected by the ESA." 63 F.3d at 919 (emphasis in original). In reaching this conclusion, the Court observed:

The overall purposes of the ESA are singularly devoted to the goal of ensuring species preservation; they do not embrace the economic and recreational interests that underlie the plaintiffs' challenge.

Id. at 920.

From this statement, it is apparent that in conducting its "zone of interest" analysis, the Ninth Circuit focused on the primary purpose of the Act, but did not consider the limitations on or means of achieving that purpose specified by Congress to be relevant to its inquiry. Had the Ninth Circuit done so, it would have discovered that Congress indeed has considered the interests of persons affected by regulation under the Act and has attempted to require federal agencies to consider such impacts in their decisionmaking. In Section 4(b)(2), for example, one of the sections which Petitioners sought to enforce, Congress has directed that when the Secretary designates critical habitat, he is to "[take] into consideration the economic impact . . . of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2).

This section, among others, was added to the Act in 1978:

[T]o retain the basic integrity of the Endangered Species Act, while introducing some flexibility which will permit exemptions from the Act's stringent requirements. At the same time, the legislation aims to improve the listing process and the public notice process of proposed listing

and designations. These improvements will insure that all listing and designations are made by the Department of Interior only after a thorough survey of all of the available data, and only after notice to the local communities that will be most affected by any listing or designation. . . .

H.R. Rep. No. 1625, 95th Cong., 2nd Sess. 14 (1978), reprinted in 1978 U.S.C.C.A.N. 9453, 9464.

In its section-by-section analysis of the 1978 amendment to the Act, the House Report No. 95-1625 stated:

Up until this time, the determination of critical habitat has been purely a biological question. With the addition of this new paragraph, the determination of critical habitat for invertebrate takes on significant added dimensions. Economics and any other relevant impact shall be considered by the Secretary in setting the limits of critical habitat for such a species. . . .

[T]he result of the committee's proposed amendment would be increased flexibility on the part of the Secretary in determining critical habitat for invertebrates. Factors of recognized or potential importance to human activities in an area will be considered by the Secretary in deciding whether or not all or part of that area should be included in the critical habitat of an invertebrate species. . . .

Id. at 17 (1978 U.S.C.C.A.N. at 9467.)

These statements exhibit a Congressional intent to expand the Secretary's analysis when designating critical habitat to include an analysis of the designation's impact on a community's economy. The Petitioners' economic

injury here falls within the "zone of interest" protected by Section 4(b)(2) of the Act; it satisfies the zone of interest test, provided the analysis includes consideration of Section 4(b)(2). As discussed in Petitioners' brief, Sections 2(c)(2) and 7(b)(3)(A) further reflect an effort by Congress to reconcile species protection with other legitimate objectives. Only by focusing exclusively on the primary overall purpose of the Act, and ignoring these sections, could the Ninth Circuit conclude that Petitioner's interests fall outside of the zone of interest protected by the Act. This case, therefore presents the Supreme Court with an opportunity to define how the "zone of interest test" is to be applied for purposes of prudential standing.

III. PRUDENTIAL STANDING IS INAPPLICABLE TO PETITIONERS WHO STAND IN PLACE OF THE AGENCY DIRECTLY REGULATED.

In its opinion, the Ninth Circuit acknowledged that the prudential standing doctrine embodied in the zone of interest test does not apply in circumstances where the litigants stand in the same position as the entity regulated directly. 63 F.3d 920 n.6, citing, *Clarke v. Securities Industry Association*, 479 U.S. at 400. In the circumstances of this case, the Petitioners do stand in the position of the entity directly regulated. In addition, only Petitioners can enforce the purposes for which Congress amended the Act.

Pursuant to Section 8 of the Reclamation Act of 1902, the right to the use of water acquired by the Bureau

under provisions of the Federal reclamation law is appurtenant to the land irrigated. 43 U.S.C. § 372. Indeed, one district court has analogized the relationship between a water user and the Bureau to the relationship between an owner of property and a lienholder:

The water right on the Newlands Project covered by approved water right applications and contracts are appurtenant to the land irrigated and are owned by the individual landowners in the Project. . . . The United States may have title to the irrigation works, but as to the appurtenant water rights it maintains only a lienholder's interest to secure repayment of the project construction costs.

United States v. Alpine Land and Reservoir Co., 503 F. Supp. 877, 879 (D. Nev. 1980), modified, 697 F.2d 851 (9th Cir.) cert. den., 464 U.S. 863 (1983); see, also, *Ickes v. Fox*, 300 U.S. 82, 94-95 (1937), reh'g den., 300 U.S. 640 (1937).

In this case, Petitioners who sought to enforce the Act stand in the same position as the Bureau, the agency regulated directly. The water left in Gerber and Clearlake Reservoirs as a result of the consultation between the Bureau and the Fish and Wildlife Service was water which Petitioners were entitled to use. 43 U.S.C. § 372.

It is for this additional reason that the application of the prudential standing rule to Petitioners is particularly inappropriate. In the circumstances of this case, the regulated agency is a sister agency of the regulator within the Department of Interior. It is therefore inconceivable that the Bureau would bring and diligently prosecute an action to enforce the Act. Petitioners, on the other hand, are in reality the "object of the action" at issue. *Lujan v.*

Defenders of Wildlife, 504 U.S. 555, 561 (1992). They have the greater interest in enforcing the statute, and the zone of interest test should not bar their action.

IV. THE COURT OF APPEALS' APPLICATION OF THE ZONE OF INTEREST TEST IMPLICATES PUBLIC POLICY CONCERNING ACCESS TO THE COURTS.

The right of access to courts is but one aspect of the First Amendment right to petition government for redress of grievances. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). Although this right is limited by numerous principles, including standing, the creation of artificial barriers should be thoroughly scrutinized.

There exists in the western United States today a growing disrespect for the federal government's management of natural resources. *Unrest in the West*, Time, Oct. 23, 1995, at pp. 52-66. In considerable part, this frustration has resulted from what is perceived to be the onerous and unjustified application of the Endangered Species Act. *This Land is Whose Land?*, Time, Oct. 23, 1995, at pp. 68-71. In some circumstances, this disrespect has resulted in intentional disobedience of the law without apparent concern by local law enforcement agencies. *Recording Indicates Rancher, Not Agents, Aggressive*, The Idaho Statesman, Sept. 14, 1995.

Unlawful conduct should be neither encouraged nor condoned; however, *Amici* query whether the Court of Appeals' decision in this case will not further exacerbate

the contempt with which some individuals regard the government. Logic suggests that it will.

In this case, ranchers and irrigation districts who are directly affected by implementation of the Act are being told that, notwithstanding the broad language in the Citizens Suit provision of the Act, they are barred from raising their grievances in court because their interests compete with those of the Lost River sucker and short-nose sucker. 63 F.3d at 921. In other words, no matter that the action of the Fish and Wildlife Service may be arbitrary or taken in violation of the provisions of the Act, Petitioners are barred from seeking redress for their grievances through the courts; instead, the judicial system is open only to those who allege an interest in the preservation of endangered species.

The frustration of individuals in the position of Petitioners is easily understood. However, such frustration is needless. Congress has not indicated any intent to limit standing beyond the requirements of Article III. To the contrary, Congress has provided standing to "any person" aggrieved by violation of the Act. 16 U.S.C. § 1540(g)(1). The zone of interest test should not be employed to bar truly aggrieved litigants from the courthouse. Assuming the test is applicable, the Court of Appeals' narrow focus on the primary purpose of the Act generally, as opposed to individual sections which litigants seek to enforce, is unwarranted. It furthers neither the multiple purposes of the Act, nor the purposes served by the prudential standing doctrine.



CONCLUSION

For the foregoing reasons, *Amici* submit that the Petition for Certiorari should be granted.

DATED: December 21, 1995

Respectfully submitted,

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In the
Supreme Court of the United States
October Term, 1995

BRAD BENNETT, et al.,
Petitioners,

v.

MARVIN L. PLENERT, et al.,
Respondents.

**Petition for Writ of Certiorari
to the United States Court of Appeals,
for the Ninth Circuit**

**BRIEF AMICUS CURIAE OF PACIFIC LEGAL
FOUNDATION, CALIFORNIA FARM BUREAU
FEDERATION, AND CALIFORNIA CATTLEMEN'S
ASSOCIATION IN SUPPORT OF PETITIONERS**

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27 pp

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	5
ARGUMENT	6
REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI	6
I. THIS COURT SHOULD RESOLVE THE CONFLICT OVER WHETHER THE ZONE OF INTERESTS TEST APPLIES TO ACTIONS FILED UNDER THE CITIZEN- SUIT PROVISION OF THE ENDANGERED SPECIES ACT	7
II. THE NINTH CIRCUIT'S OPINION IS IN CONFLICT WIT THE PRECEDENTS OF THIS COURT	11
III. THIS CASE INVOLVES IMPORTANT ISSUES OF LAW THAT SHOULD BE RESOLVED BY THIS COURT	14
A. The Ninth Circuit's Opinion Ignores Congressional Intent to Protect the Rights of State and Local Water Districts	15

	Page
B. The Ninth Circuit's Opinion Ignores the Numerous ESA Amendments Designed to Protect Economic Rights	16
CONCLUSION	19

TABLE OF AUTHORITIES CITED

	Page
Cases	
Air Courier Conference of America v. American Postal Workers Union, 498 U.S. 517 (1991)	14
Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970)	11
Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, ___ U.S. ___, 63 U.S.L.W. 4665 (1995)	2
Barlow v. Collins, 397 U.S. 159 (1970)	14
Bennett v. Plenert, 63 F.3d 915 (9th Cir. 1995)	3-5, 8, 10-14
Clarke v. Securities Industries Association, 479 U.S. 388 (1987)	14
Defenders of Wildlife v. Hodel, 851 F.2d 1035 (8th Cir. 1988), opinion after remand, 911 F.2d 117 (8th Cir. 1990), rev'd on other grounds, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).	8-9
Douglas County, Oregon v. Babbitt, Case No. 95-371	2

	Page
Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979)	9,12-13
Gonzales v. Gorsuch, 688 F.2d 1263 (9th Cir. 1982) . .	3
Humane Society of the United States v. Hodel, 840 F.2d 45 (D.C. Cir. 1988)	9
Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)	7,9
Pacific Legal Foundation v. Andrus, 657 F.2d 829 (6th Cir. 1981)	2
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)	19
State of Idaho By and Thru Idaho Public Utilities Commission v. Interstate Commerce Commission, 35 F.3d 585 (D.C. Cir. 1994)	9
Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978)	2
Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972)	12-13
Warrh v. Seldin, 422 U.S. 490 (1975)	11,13

Statutes

Civil Rights Act of 1968 § 810(a)	12
§ 810(d)	12

	Page
§ 812(a)	12-13
16 U.S.C. § 1531(c)(2)	15
§ 1532(13)	8
§ 1533(b)(2)	4,16
§ 1536	16
§ 1536(a)	4
§ 1539(a)(1)(B)	17
§ 1539(b)	18
§ 1539(e)(B)	18
§ 1540(g)	8-9
§ 1540(g)(1)	4
42 U.S.C. § 3610(a)	12

Rules

Supreme Court Rule 10.1(a)	7
10.1(c)	7
Rule 37	1

United States Constitution

Article III 5-7,10,13

Miscellaneous

Chief Justice Vinson, Address Before the American
Bar Association, Sept. 7, 1949, 69 S. Ct. v, vi . . . 6-7Ike Sugg, Caught in the Act: Evaluating the
Endangered Species Act, Its Effects on
Man and Prospects for Reform, 24 Cumb.
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In the
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BRAD BENNETT, et al.,
Petitioner,
v.

MARVIN L. PLENERT, et al.,
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Petition for Writ of Certiorari
to the United States Court of Appeals,
for the Ninth Circuit

**BRIEF AMICUS CURIAE OF
PACIFIC LEGAL FOUNDATION,
CALIFORNIA FARM BUREAU FEDERATION,
AND CALIFORNIA CATTLEMEN'S ASSOCIATION
IN SUPPORT OF PETITIONERS**

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae on behalf of itself, the California Farm Bureau Federation, and the California Cattlemen's Association. Written permission from all parties to file this brief have been lodged with the Clerk of the Court.

INTEREST OF AMICUS CURIAE

The California Farm Bureau Federation (CFBF) is a nonprofit, tax-exempt corporation existing under the laws of the State of California. Its members are 53 county farm bureaus located throughout California through which it represents owners and operators of farms and ranches, as well as other residents of the state who are interested in the welfare of agriculture.

The California Cattlemen's Association (CCA), a nonprofit corporation, founded in 1917, represents the state's beef cattle industry in legislative and regulatory affairs. Beef cattle producers operate over 40 million of California's 100 million acres and contributed \$1.5 billion to the state's \$19.7 billion agriculture economy in 1993. The industry provides more than 26,000 jobs from the ranch level to the processing level in the State of California.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest. PLF has over 20,000 supporters nationwide. Policy for PLF is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only when the Foundation's position has broad support within the general community. PLF's Board of Trustees has authorized the filing of an amicus curiae brief in this matter.

PLF has participated in numerous cases involving the Endangered Species Act and has a history of helping landowners that have been injured by government action taken pursuant to the ESA. PLF was a party of record in *Pacific Legal Foundation v. Andrus*, 657 F.2d 829 (6th Cir. 1981), and the Foundation participated as amicus in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, ___ U.S. ___, 63 U.S.L.W. 4665 (1995); *Douglas County, Oregon v. Babbitt*, Case No. 95-371; and *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978). PLF attorneys have

also litigated the issue of standing under environmental statutes. For example, PLF attorneys were counsel of record in *Gonzales v. Gorsuch*, 688 F.2d 1263 (9th Cir. 1982), a case which involved standing under the Clean Water Act's citizen-suit provision.

PLF seeks to augment the argument in the petition for writ of certiorari. PLF believes that its public policy perspective and litigation experience in support of economic rights will provide an additional needed viewpoint with respect to the issues presented by this case.

STATEMENT OF THE CASE

This case addresses the issue of which plaintiffs have standing to challenge governmental actions taken pursuant to the Endangered Species Act. In *Bennett v. Plenert*, 63 F.3d 915 (9th Cir. 1995), the Ninth Circuit gave a very narrow answer to this question by ruling that only those plaintiffs alleging an interest in the protection and preservation of species have standing under the ESA.

The petitioners in this case are two Oregon ranchers and two irrigation districts that use water provided by the federal government's Klamath Project, which is operated by the United States Bureau of Reclamation (Bureau). In 1992, the Bureau became concerned that the operation of the Klamath Project may harm two species of fish listed as endangered under the ESA; the Lost River sucker and the shortnose sucker. The Bureau contacted the United States Fish and Wildlife Service (FWS) in order to determine whether the two species of fish were threatened by the continuing operation of the project. FWS prepared a biological opinion which concluded that the "long term operation of the Klamath Project was likely to jeopardize the continued existence of the Lost River and shortnose suckers." *Bennett*, 63 F.3d at 916. Among the mitigation measures suggested by the FWS in its opinion was the recommendation that the Bureau maintain minimum water levels in the

Klamath Project. The Bureau informed FWS that it intended to comply with this recommendation.

Petitioners filed suit in the United States District Court for the District of Oregon under the ESA's citizen suit provision. 16 U.S.C. § 1540(g)(1). Petitioners' complaint alleged that there was no evidence to support FWS' determination that the sucker fish were threatened by the operation of the Klamath Project. On the contrary, according to the petitioners, the two species of fish were reproducing successfully, and thus were not in need of federal protection. Specifically, the complaint charged that FWS had not complied with the consultation provisions of Section 1536(a), and that they had failed to consider the economic impact of their decision in violation of Section 1533(b)(2). In an unpublished decision, the District Court concluded that petitioners lacked standing to challenge the FWS determination and dismissed their suit.

On appeal the Ninth Circuit concurred with the District Court and held that only those plaintiffs "who allege an interest in the *preservation* of endangered species fall within the zone of interests protected by the ESA." *Bennett*, 63 F.3d at 919 (emphasis in original).¹

Although recognizing that the Eighth Circuit had found that the ESA's broad citizen-suit provision "necessarily abrogated any zone of interest test," the Ninth Circuit held that notwithstanding the citizen-suit provision, Congress had not waived the zone of interests test with respect to actions brought under the ESA. *Id.* at 918 n.3. According to the *Bennett* court, because the ESA is "singularly devoted to the

¹ The Ninth Circuit only addressed the issue of whether petitioners were within the zone of interests protected by the ESA and did not determine whether they had satisfied the constitutionally based standing requirements. *Bennett v. Plenert*, 63 F.3d at 917.

goal of ensuring species preservation," *id.* at 920, plaintiffs alleging solely an economic or recreational interest are without standing to challenge governmental action taken pursuant to the ESA. Thus, the court held that petitioners in this case lacked standing. This decision is in conflict with decisions reached by other federal circuit Courts of Appeals, it conflicts with Supreme Court precedent and it raises important issues of federal law that should be resolved by this Court.

SUMMARY OF ARGUMENT

The Ninth Circuit opinion only adds to the confusion which currently exists among the federal circuits on the issue of whether the ESA citizen-suit provision evidences a congressional intent to waive the prudential zone of interest standing requirement. The Eighth Circuit has concluded that the broad language employed by Congress in drafting this provision has waived any zone of interest inquiry. Thus, plaintiffs filing suit under the ESA in the Eighth Circuit must only meet the requirements of Article III to have standing. The District of Columbia Circuit has applied the zone of interests test to actions filed pursuant to the ESA; however, the court has not yet defined exactly which interests are within the zone protected by the ESA. In *Bennett*, the Ninth Circuit held that the zone of interest does apply to the ESA and that only those plaintiffs alleging an interest in preserving or protecting species are within that zone. This Court should grant the writ of certiorari to resolve this conflict of authority.

The opinion of the Ninth Circuit also failed to properly apply the decisions of this Court which make it clear that Congress may waive prudential standing limitations. This Court has interpreted legislation similar to the citizen-suit provision at issue in this case and has determined that it

demonstrates a congressional intent to define standing as broadly as is permitted by Article III of the Constitution. Although the court below recognized congressional ability to supplant prudential standing elements, it held that despite the broad language used by Congress in drafting the ESA citizen-suit provision the zone of interest applies to suits filed under the Act. This ruling is in direct conflict with the decisions of this Court.

The opinion below also fails to effectuate congressional intent thereby raising issues of national importance which should be resolved by this Court. According to the Ninth Circuit the ESA is "singularly devoted" to the goal of preserving wildlife. While it is true that the ESA was enacted to protect and preserve species, this narrow reading of the ESA fails to recognize the numerous provisions of the Act adopted in order to protect economic interests. Passed in 1973, the ESA has gone through a series of amendments designed to incorporate a flexible approach to balancing species preservation with economic interests. The opinion rendered in *Bennett* fails to recognize that the plain language of the Act, as well as its legislative history, demonstrates that Congress intended to protect the economic interests of individuals such as the petitioners in this case.

ARGUMENT
REASONS FOR GRANTING THE
PETITION FOR WRIT OF CERTIORARI

"The debates in the Constitutional Convention make clear that the purpose of the establishment of one supreme national tribunal was, in the words of John Rutledge of South Carolina, 'to secure the national rights & uniformity of Judgments.'" Chief Justice Vinson, Address Before the American Bar Association, Sept. 7, 1949, 69 S. Ct. v, vi

(emphasis added). Chief Justice Vinson's observations are codified in Supreme Court Rule 10.1(a) which lists among the considerations governing review on certiorari the circumstance when a United States Court of Appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter. Rule 10.1(c) includes as grounds for review when a United States Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court. Each of these grounds for review is present in this case.

I

**THIS COURT SHOULD RESOLVE THE
CONFLICT OVER WHETHER THE
ZONE OF INTERESTS TEST APPLIES
TO ACTIONS FILED UNDER THE
CITIZEN-SUIT PROVISION OF
THE ENDANGERED SPECIES ACT**

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), this Court held that the citizen suit provision contained in the ESA was not sufficient, in and of itself, to satisfy the requirements of Article III. This Court reiterated the now familiar standard that at an "irreducible constitutional minimum" the plaintiff seeking relief in the federal courts must establish an injury in fact, a causal connection between the injury and the conduct of the defendant, and that the injury is likely to be redressed by a favorable decision. *Lujan*, 504 U.S. at 560-61. This Court did not, however, address the issue of whether the ESA's citizen-suit provision waived the prudential standing requirement that the plaintiff be within the zone of interests sought to be protected by the statute in question. The United States Courts of Appeals

have split on this issue and two conflicting lines of authority have emerged. *Bennett v. Plenert* provides this Court with an opportunity to resolve the irreconcilable conflict of authority which currently divides the Circuit Courts.

The language employed by Congress in drafting the ESA's citizen-suit provision is without limits or ambiguity. The provision provides:

(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his behalf

(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof.

16 U.S.C. § 1540(g). Further evidence of congressional intent can be gleaned from the equally expansive definition of "person" found in the Act. That term is defined under the ESA to mean "an individual, corporation, partnership, trust, association, or any other private entity, or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State or political subdivision thereof, or of any foreign government." 16 U.S.C. § 1532(13). Despite the clear language used by Congress in drafting these provisions courts have reached extremely divergent views on whether this text is evidence of legislative desire to obviate the zone of interests inquiry.

The Eighth Circuit has concluded that the ESA's citizen suit provision "necessarily abrogated" the zone of interests standard. *Defenders of Wildlife v. Hodel*, 851 F.2d 1035,

1039 (8th Cir. 1988), *opinion after remand*, 911 F.2d 117 (8th Cir. 1990), *rev'd on other grounds*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555. In *Hodel*, the court began its analysis of the zone of interests question by recognizing the fundamental principle that Congress may eliminate the prudential standing requirements by legislation. *Hodel*, 851 F.2d at 1039 (citing *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979)). The court then examined the plain language of the Act's citizen suit provision and concluded that the text of that provision evidenced a congressional intent to waive the prudential standing requirements under the ESA. The ESA provides that "any person" may commence a suit to enjoin any person who is alleged to be in violation of the Act. 16 U.S.C. § 1540(g). According to the *Hodel* court, because the plaintiffs were "persons" as defined by the Act they needed only to satisfy the constitutionally based requirements in order to have standing under the ESA. *Hodel*, 851 F.2d at 1039. Although *Hodel* was eventually overturned by this Court in *Lujan v. Defenders of Wildlife*, nothing in this Court's *Lujan* opinion disturbed the Eighth Circuit's conclusion that the plain text of the ESA waived the prudential zone of interests test.

The reasoning employed by the Eighth Circuit in *Hodel* is made exceptional only by its uniqueness. Other circuits have refused to rely on the plain language of the citizen-suit provision, and have decided that the broad language of that subsection does not provide sufficient evidence that Congress intended to waive the zone of interests test. The District of Columbia Circuit has held that the zone of interests test does apply to the ESA. *State of Idaho By and Thru Idaho Public Utilities Commission v. Interstate Commerce Commission*, 35 F.3d 585, 592 (D.C. Cir. 1994); *Humane Society of the United States v. Hodel*, 840 F.2d 45 (D.C. Cir. 1988). Although finding that the zone of interests test applies to actions filed pursuant to the ESA, the D.C. Circuit has yet

to clearly delineate the parameters of that zone. Significantly, unlike the Ninth Circuit in *Bennett*, the D.C. Circuit has not used the zone of interests inquiry to deny standing to plaintiffs asserting an economic injury under the ESA.

In *Bennett* the Ninth Circuit stated, "notwithstanding the broad language of the citizen-suit provision, we directly reject the plaintiffs' contention that it renders the zone of interests test inapplicable to claims brought under the ESA." *Bennett v. Plenert*, 63 F.3d at 918. The *Bennett* court then went a step further than the D.C. Circuit and held that only plaintiffs' alleging an interest in the *preservation* of species fall within the zone of interests protected by the ESA. *Bennett*, 63 F.3d at 919. Because the plaintiffs alleged no such interest they were outside of the ESA's zone of interest and, thus, without standing. The Ninth Circuit expressly recognized that its decision was patently inconsistent with the position taken by the Eighth Circuit, however, the court made no attempt to reconcile these two cases. *Bennett*, 63 F.3d at 918 n.3.

As it now stands, the ability to bring a claim under the ESA alleging an interest other than species preservation is entirely dependent upon the accident of geography. Plaintiffs suffering an economic injury under the ESA in the Eighth Circuit may look to the federal courts to vindicate their rights and protect their interests. Plaintiffs in the Ninth Circuit, suffering an identical injury, however, will find the court house doors closed to them. The Eighth Circuit has determined that the broad language of the citizen-suit provision waived the prudential zone of interests test and that plaintiffs need only satisfy the requirements of Article III in order to have standing under the ESA. The District of Columbia Circuit has held that the zone of interests test does apply to the ESA, however, that court has yet to clearly define which interests fall within the zone. The Ninth Circuit has taken an extreme position and proclaimed that the

zone of interests test applies to ESA and that only plaintiffs alleging an interest in the preservation of endangered species have standing to challenge actions taken pursuant to the Act.

The United States Courts of Appeals are in disarray. *Bennett v. Plenert* provides this Court with an opportunity to settle the issue of whether the ESA waived the prudential zone of interests test. In the alternative, if this Court concludes that the zone of interests does apply, *Bennett* allows the Court the chance to clearly define which interests fall within the zone protected and regulated by the ESA. This Court should grant the petition for writ of certiorari to settle this conflict.

II

THE NINTH CIRCUIT'S OPINION IS IN CONFLICT WITH THE PRECEDENTS OF THIS COURT

One of the corner stones of the modern standing doctrine is the principle that Congress has the ability to waive the zone of interests requirement. This Court has explicitly recognized that "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). In *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 154 (1970), the case which first defined with precision the zone of interests inquiry, this Court noted "Congress can, of course, resolve the question one way or another, save as the requirements of Article III dictate otherwise." Commentators have also recognized this fundamental principle: "The (prudential standing) doctrines, in any event, are wholly subject to supplantation by Congress, as long as disputes thus allowed remain of an otherwise justiciable nature." Laurence H. Tribe, *American Constitutional Law*, 135 (2d ed. 1988). The

court in *Bennett* acknowledged congressional ability to override the zone of interests requirement, however, the court concluded, "the fact that a statute contains a citizen-suit provision does not necessarily establish that Congress intended that any particular plaintiff have standing to assert a violation." *Bennett*, 63 F.3d at 919. This reasoning is inconsistent with previous holdings of this Court.

In *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972), this Court interpreted a provision of the Fair Housing Act that bears a striking resemblance to the citizen-suit provision at issue in the current case. The provision before the Court in *Trafficante* was Section 810(a) of the Civil Rights Act of 1968, which states in relevant part:

Any person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur (hereafter "persons aggrieved") may file a complaint with the Secretary.

42 U.S.C. § 3610(a). Section 810(d) of the Civil Rights Act provides that if the Secretary is unable to secure voluntary compliance with the Act the person aggrieved may file suit in the appropriate United States District Court. Speaking for the Court, Justice Douglas recognized that the language employed by Congress in drafting this provision was "broad and inclusive." *Trafficante*, 409 U.S. at 209. This Court concluded that Section 810(a) demonstrated congressional intent to define standing as broadly as is permitted by Article III of the Constitution. *Id.*

Seven years later, this Court was again called upon to determine which plaintiffs had standing to bring suit alleging a violation of the Fair Housing Act. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91. In this case, however, the Court was asked to interpret the reach of Section 812(a) of

the Civil Rights Act.² This Court stated: "Congress may, by legislation expand standing to the full extent permitted by Art III, thus permitting litigation by one 'who otherwise would be barred by prudential standing rules.'" *Gladstone*, 441 U.S. at 100 (quoting *Warth v. Seldin*, 422 U.S. at 501). Starting from this premise, this Court reached the inevitable conclusion that standing under this provision of the Fair Housing Act was "as broad[d] as is permitted by Article III of the Constitution." *Gladstone*, 441 U.S. at 109 (quoting *Trafficante*, 409 U.S. at 209). These cases leave no doubt as to congressional ability to expand the class of potential plaintiffs so long as it does not invade the "core" Article III based standing requirements. Unfortunately, the Ninth Circuit failed to apply this well-settled rule to the ESA citizen-suit provision. *Bennett* directly conflicts with both *Trafficante* and *Gladstone* and this Court should grant the writ to resolve this conflict.

² Section 812 provides in part:

(a) The rights granted by sections 803, 804, 805, and 806 may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction.

III

**THIS CASE INVOLVES
IMPORTANT ISSUES OF LAW
THAT SHOULD BE RESOLVED BY THIS COURT**

In analyzing the zone of interests test this Court explained, "at bottom the reviewability question turns on congressional intent, and all indicators helpful in discerning that intent must be weighed." *Clarke v. Securities Industries Association*, 479 U.S. 388, 400 (1987). This Court has stressed that the zone of interests test was "not meant to be especially demanding." *Clarke*, 479 U.S. at 399. The precedents of this Court also make clear that congressional intent is to be derived from both the language and the legislative history of the statute in question. *Barlow v. Collins*, 397 U.S. 159, 164 (1970); *Air Courier Conference of America v. American Postal Workers Union*, 498 U.S. 517, 524-26 (1991). In *Bennett* the Ninth Circuit held that because the overall purposes of the ESA are singularly devoted to the goal of ensuring species preservation, the Act does not embrace or protect economic interests. *Bennett*, 63 F.3d at 920. This conclusion completely ignores congressional intent by failing to acknowledge the numerous ESA provisions designed to protect economic interests, in general, and water rights, in particular. The importance of this case is grounded in the multitude of ESA subsections designed to protect economic interests which have been neglected by the Ninth Circuit's analysis in *Bennett*.

**A. The Ninth Circuit's Opinion
Ignores Congressional Intent
to Protect the Rights of
State and Local Water Districts**

The plain language of the ESA clearly contemplates the importance of state and local water rights. In a statement of the Act's policy, the statute reads: "[I]t is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species." 16 U.S.C. § 1531(c)(2). Congress recognized that the laudable goal of species preservation could potentially infringe upon the autonomy of local agencies with regard to water issues. In an attempt to strike a balance between species preservation on the one hand, and water rights on the other, Congress expressly mandated federal cooperation with local water districts. This provision provides compelling evidence that Congress intended water districts to fall within the boundaries of the ESA's zone of interests.

Two of the petitioners in this case, Langell Valley Irrigation District and Horsefly Irrigation District, are political subdivisions of the State of Oregon; more specifically they are local irrigation districts. These districts are the kind of "local agency" which Congress expressly declared the federal government should cooperate with to resolve water resource issues. In concluding that the water districts fell outside of the Act's zone of interests, the court failed to make any mention of this provision mandating cooperation between the different levels of government. Given the high priority Congress placed on the rights of local water agencies, and the need to balance water resources issues with species preservation, this Court should grant the writ of certiorari in order to effectuate congressional intent.

**B. The Ninth Circuit's Opinion
Ignores the Numerous ESA Amendments
Designed to Protect Economic Rights**

In addition to the preservation of water rights, the ESA also attempts to protect economic interests which might otherwise be trampled upon in the government's haste to protect threatened species of wildlife. Since its genesis in 1973, the ESA has evolved through a series of amendments which have incorporated a more balanced approach to species preservation. These amendments reflect a congressional understanding of the need for added flexibility in the Act's decision-making process. In 1978, the Act was amended to specifically mandate that the government consider economic factors in designating critical habitat for a species. 16 U.S.C. § 1533(b)(2). That provision declares: "The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the *economic impact*, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2) (emphasis added).

In 1982 Congress further amended the ESA in an attempt to provide more economic protection under the Act. The most significant amendments added in 1982 created an exemption process to the ESA's taking prohibition which one commentator noted, "is the principle way in which economic considerations are intended to factor into application of the ESA." Ike Sugg, *Caught in the Act: Evaluating the Endangered Species Act, Its Effects on Man and Prospects for Reform*, 24 Cumb. L. Rev. 1, 37 (1993). The exemption process created the Endangered Species Committee, which is allowed to circumvent the strict takings prohibitions of the ESA if such action is found to be in the public interest. 16 U.S.C. § 1536.

The 1982 Amendments also offered relief to private property owners and other persons that might otherwise be adversely affected by strict compliance with the ESA's provisions. The amendments allow for the "incidental" taking of a listed species. 16 U.S.C. § 1539(a)(1)(B). An incidental taking is the taking of a species that occurs as the by-product "of carrying out an otherwise lawful activity." *Id.* With the Secretary's permission, such incidental takings are not considered a violation of the ESA. The legislative history behind this section provides clear evidence of what Congress intended to accomplish by enacting this provision.

This provision establishes a procedure whereby those persons whose actions may affect endangered or threatened species may receive permits for the incidental taking of such species, provided the action will not jeopardize the continued existence of the species. *This provision addresses the concerns of private landowners* who are faced with having otherwise lawful actions not requiring Federal permits prevented by section 9 prohibitions against taking.

H.R. Rep. No. 567, 97th Cong., 2nd Sess. (1982) (*emphasis added*). Congress recognized that the interests of landowners in the productive use of their land may be in conflict with the goal of conservation. Rather than adopting a hard and fast rule against the "taking" of a species, Congress instead chose to steer a middle course between these two competing interests and adopted a flexible approach to the problem. *Id.* (Sections 6 (1) and (2) give the Secretary more flexibility in regulating the incidental taking of endangered species.) Thus, economics and reasonable property uses were made relevant interests to be considered and respected under the ESA.

This flexible approach is also found in the ESA amendments allowing for hardship exemptions. 16 U.S.C. § 1539(b). If the listing of a species will cause undue economic hardship to an individual who has entered into a commercial contract regarding that species, the Secretary may exempt that individual from the application of the ESA. *Id.* This subsection also makes special allowances for natives of Alaska, provided the taking is "primarily for subsistence purposes." 16 U.S.C. § 1539(e)(B). Congress understood the vast array of human activities which may be jeopardized in an unbridled attempt to preserve species and set out to provide a better mechanism to protect these activities. The reasoning employed by the Ninth Circuit in this case fails to recognize Congress' attempt to protect and preserve economic interests.

Any doubt as to the intent behind the 1982 revisions disappears upon reading the legislative history supporting those amendments. The House Report accompanying the 1982 amendments details the goals sought to be achieved by the Act:

The Endangered Species Preservation Act of 1966 and the Endangered Species Conservation Act of 1969 preceded the 1973 Act to address the same problem, but it was the last statute which constructed a comprehensive means to *balance economic growth and development with adequate conservation measures.*

H.R. Rep. No. 567, 97th Cong., 2nd Sess. (1982) (*emphasis added*). The legislative history also traces the evolution of the ESA from 1973 through 1982:

Subsequent to its passage, the Act was amended in 1976, 1978 and 1979 to increase the *flexibility*

in balancing species protection and conservation with development projects.

Id. (emphasis added). Economic protection under the ESA reached its apex with the 1982 amendments. The provisions added in that year, as well as the legislative history explaining those provisions, demonstrate beyond all doubt that economic interests are within the zone of interests protected and regulated by the ESA. The Ninth Circuit's opinion fails to recognize these economic protections and leaves those plaintiffs suffering an economic injury without a remedy. This Court should grant the writ of certiorari to ensure that congressional intent to protect economic interests under the ESA is not ignored.

CONCLUSION

For nearly two centuries it has been axiomatic that "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). The federal courts stand as a bulwark between the United States government and the rights of private citizens. If the petitioners in this case are denied standing to challenge this action the FWS would be given unbridled discretion under the ESA and would be immunized from judicial attack by those individuals forced to bear the burden of governmental regulations. Surely Congress could not have intended such an illogical and arbitrary result. The Ninth Circuit's decision is contrary to the decisions of other circuits and this Court. This Court

should grant the petition for writ of certiorari and give effect to Congress' intent to confer standing to the limits of Article III.

DATED: December, 1995.

Respectfully submitted,

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No. 95-813

Supreme Court, U.S.
FILED
MAY 23 1996

CLERK

In The
Supreme Court of the United States
October Term, 1995

BRAD BENNETT, et al.,

Petitioners.

vs.

MARVIN PLENERT, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed November 21, 1995
Certiorari Granted March 25, 1996

TABLE OF CONTENTS

	Page
RELEVANT DOCKET ENTRIES	1
COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF – Appendix to Petition for Writ of Certiorari	31-44
DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT – Appen- dix to Petition for Writ of Certiorari	1-18
60-DAY WRITTEN NOTICE OF VIOLATION; NOTICE OF INTENT TO SUE (Attached as Exhibit A to Complaint for Declaratory and Injunctive Relief filed with U.S. District Court) Including Draft Copy of Complaint for Declara- tory and Injunctive Relief attached as Exhibit A to 60-Day Written Notice	2-17
BIOLOGICAL OPINION REGARDING LONG- TERM OPERATION OF THE KLAMATH PRO- JECT (Attached as Exhibit B to Complaint for Declaratory and Injunctive Relief filed with U.S. District Court)	18-117

STATEMENT OF RELEVANT DOCKET ENTRIES

1. Petitioner's Complaint, filed. 3/8/93
 2. Defendants' Motion to Dismiss, filed. 5/7/93
 3. District Court's Order Granting Defendants'
Motion to Dismiss, signed. 11/18/93
 4. Judgment Dismissing Action, entered. 11/19/93
 5. Notice of Appeal, filed. 12/16/93
 6. Opinion of Court of Appeals, filed. 8/24/95
 7. Suggestion for Rehearing En Banc, filed. 10/23/95
 8. Suggestion for Rehearing En Banc,
denied. 11/21/95
 9. Petition for Writ of Certiorari, filed. 11/21/95
 10. Petition for Writ of Certiorari, granted. 3/25/96
-

EXHIBIT "A" (To Complaint for
Declaratory and Injunctive Relief)

**60 DAY WRITTEN NOTICE OF VIOLATION
NOTICE OF INTENT TO SUE
16 U.S.C. SECTION 1540(g)(2)(A)
Via Registered Mailings (RRR) to:**

Secretary, United States Department of the Interior
Office of the Secretary
Washington, DC 20240; and
Director, U.S. Fish & Wildlife Service
U.S. Department of the Interior
Washington, DC 20240; and
Regional Director, United States Fish & Wildlife
Service
Regional Office, Region 1
500 NE Multnomah Street, Suite 1692
Portland, Or 97232; and
Commissioner, Bureau of Reclamation
U.S. Department of the Interior
Washington, D.C. 20240; and
Regional Director, Pacific Northwest Region,
Bureau of Reclamation
Federal Building, United States Courthouse,
550 W. Fort Street,
Boise, ID 83724-0043; and
Regional Director, Mid-Pacific Region
Bureau of Reclamation
Federal Office Building
2800 Cottage Way
Sacramento, CA 95825.

NOTICE IS HEREBY GIVEN on behalf of Brad Bennett,
an individual, Frank and Linda Hammerich, individually
and as Husband and Wife, Mario Giordano, an individ-
ual, and Langell Valley Irrigation District and Horsefly
Irrigation District, both political subdivisions of the State

of Oregon, (all hereinafter called "Notifiers") that they
intend to bring suit against the above named parties or
some of them for violations of the Endangered Species
Act of 1973, 16 U.S.C. Sections 1531 to 1544 (hereinafter
"ESA"). The claims of said parties are more particularly
described in a document entitled, "Complaint for Declar-
atory and Injunctive Relief" which is attached hereto and
incorporated herein as Exhibit "A". Notwithstanding the
caption of Exhibit A, said document has not yet been filed
in any Court, and is exhibited by this Notice only for the
purpose of identifying the persons giving this notice,
their lawyers, and stating their claims.

The continued violation or violation of the provisions
of the ESA as set forth, will result in the filing of said
Complaint or a substantially similar one, pursuant to 16
U.S.C. Section 1540(g)(2)(A).

The names, mailing addresses and telephone
numbers of the Notifiers are:

Brad Bennett, P.O. Box 216, Bonanza, OR 97623, (503)
545-6062;

Frank and Linda Hammerich, 15666 E. Langell Valley
Rd., Bonanza, OR 97623, (503) 545-6620;

Mario Giordano, 11431 W. Langell Valley Rd.,
Bonanza, OR 97623, (503) 545-6206;

Langell Valley Irrigation District, 9787 E. Langell Val-
ley Rd. Bonanza, OR, (503) 545-6344;

Horsefly Irrigation District, P.O. Box 188, Bonanza,
OR 97623, (503) 545-6474.

This Notice is given by the undersigned on behalf of the Notifiers, and the addresses and telephone numbers of the undersigned are stated within Exhibit A.

Dated: November 12, 1992.

William F. Schroeder, Esq.
 John T. Schroeder, Esq.
 Larry A. Sullivan, Esq.
 W. Alan Schroeder, Esq.
 By /s/ W. F. Schroeder
 Lawyers for Notifiers.

EXHIBIT A (To 60 Day Written Notice)

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Lawyers for Plaintiffs.

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF OREGON

BRAD BENNETT, an individual;)
 FRANK HAMMERICH and LINDA)
 HAMMERICH, individually and as)
 Husband and Wife; MARIO)
 GIORDANO, an individual;)
 LANGELL VALLEY IRRIGATION) Case No.
 DISTRICT, a political sub-division)
 of the State of Oregon; HORSEFLY)
 IRRIGATION DISTRICT, a political)
 sub-division of the State of)
 Oregon,)
 Plaintiffs,)
 vs.)

MARVIN PLENERT, in his official	) COMPLAINT
capacity as Regional Director,	) FOR
Region One, Fish and Wildlife	) DECLARATORY
Service, United States Department	) AND
of the Interior; JOHN F. TURNER,	) INJUNCTIVE
in his official capacity as Director,	) RELIEF
Fish and Wildlife Service, United)
States Department of the Interior;)
and MANUEL LUJAN, in his)
official capacity as Secretary,)
United States Department of the)
Interior,)
)
Defendants,)
)

PRELIMINARY STATEMENT

1. This is an action for declaratory judgment. Plaintiffs seek to compel Defendants to withdraw portions of the biological opinion issued by the Fish and Wildlife Service on July 22, 1992, ("the Biological Opinion"), pursuant to the agency consultation provisions of the Endangered Species Act ("ESA"). A copy of the Biological Opinion is attached hereto and incorporated herein as Exhibit A. The Biological Opinion improperly concludes that continued operation of Clear Lake reservoir in northern California and Gerber reservoir in southern Oregon by the Bureau of Reclamation ("BOR") jeopardizes two endangered species, the Lost River sucker and the shortnose sucker. As a consequence of its erroneous jeopardy conclusion, the Biological Opinion improperly seeks to impose restrictions on the BOR's operation of Clear Lake reservoir and Gerber reservoir. In addition, critical habitat for the Lost River sucker and the shortnose sucker has

never been determined by defendants, and these restrictions are invalid for that reason as well. On information and belief, Plaintiffs allege that the BOR will abide by the restrictions imposed by the Biological Opinion.

2. This action arises under and alleges violations of the ESA, 16 U.S.C. §§ 1531 *et seq.*, and its implementing regulations, 50 C.F.R. Part 402, and the Administrative Procedure Act (the "APA"), 5 U.S.C. §§ 551 *et seq.*

JURISDICTION AND VENUE

3. Jurisdiction over this action is conferred by 16 U.S.C. § 1540 (g)(1)(C) (ESA citizens' suit) and 28 U.S.C. §§ 1331 (federal question), and 2201 (declaratory relief). A copy of plaintiffs' 60-day Notice of Intent to Sue, dated October 26, 1992, is attached hereto as Exhibit B.

4. Venue is properly in this Court pursuant to 28 U.S.C. § 1391(e), as some or all of the plaintiffs reside in this district and a substantial part of the events or omissions giving rise to the claim occurred in this district.

PARTIES

5. The plaintiffs in this action are:

A. Brad Bennett ("Bennett"), a rancher who resides near Bonanza, Oregon, and who receives most of his irrigation water from Clear Lake reservoir. Brad Bennett's ranch is located within the Horsefly Irrigation District.

B. Frank and Linda Hammerich ("Hammerich"), ranchers who reside near Bonanza, Oregon, and who

receive irrigation water from Gerber reservoir. The Hammerich ranch is located within the Langell Valley Irrigation District.

C. Mario Giordano ("Giordano"), a rancher who resides near Bonanza, Oregon, and who receives irrigation water from Clear Lake reservoir. Mario Giordano's ranch is located within the Langell Valley Irrigation District.

D. Horsefly Irrigation District ("HID") is a political subdivision of the State of Oregon organized pursuant to Oregon Revised Statutes chapter 545 for the purpose of delivering irrigation water to its patrons within the District. The District is located in Klamath County, Oregon, and it receives irrigation water from Clear Lake reservoir in northern California via the Lost River, pursuant to contracts with the United States. The District office is located in Oregon in the town of Bonanza.

E. Langell Valley Irrigation District ("LVID") is a political subdivision of the State of Oregon organized pursuant to Oregon Revised Statutes chapter 545 for the purpose of delivering irrigation water to its patrons within the District. The District is located in Klamath County, Oregon, and it receives irrigation water from Gerber reservoir via Miller Creek and Clear Lake reservoir in northern California via Lost River, pursuant to contracts with the United States. The District office is located in Oregon near the town of Bonanza, Oregon.

6. Plaintiffs use Gerber reservoir, Clear Lake reservoir, Miller Creek, and Lost River for recreational, aesthetic and commercial purposes, as well as for their primary sources of irrigation water. Plaintiffs' use of

Clear Lake reservoir, Gerber reservoir, Miller Creek, and Lost River will be irreparably damaged by defendants' disregard of their statutory duties, as described below, and by the unlawful restrictions placed by defendants on the use of Clear Lake reservoir and Gerber reservoir.

7. Unless the relief prayed for herein is granted, the above-described recreational, aesthetic and commercial interests of plaintiffs will be adversely affected and irreparably injured by the erroneous conclusion of defendants that the BOR's continued operation of Clear Lake reservoir and Gerber reservoir will likely jeopardize the survival of the Lost River sucker and the shortnose sucker unless restrictions are placed on such operation.

8. The defendants in this action are:

A. Marvin Plenert, in his official capacity as director of Region One of the Fish and Wildlife Service, United States Department of the Interior. Region One of the Fish and Wildlife Service includes Clear Lake reservoir and Gerber reservoir. The Biological Opinion was issued by the Region One office of the Fish and Wildlife Service.

B. John F. Turner is the Director of the Fish and Wildlife Service, United States Department of the Interior.

C. Manuel Lujan is the Secretary of the United States Department of the Interior (the "Secretary"). The Secretary is empowered by the ESA to make jeopardy determinations concerning threatened and endangered species pursuant to 16 U.S.C. § 1536(b)(3)(A).

FACTS

9. Clear Lake reservoir and Gerber reservoir were constructed early in the twentieth century in the eastern portion of the Klamath Project by the BOR to provide irrigation water to farmers and ranchers in southern Oregon. Although Clear Lake reservoir and Gerber reservoir are part of BOR's Klamath Project, they are operated separate and distinct from the western portion of the Klamath Project, which consists of the Klamath River and Upper Klamath Lake in Oregon and Lower Klamath Lake and Tule Lake in California. A diagram showing the bodies of water in the Klamath Project is attached hereto as Exhibit C. The separated systems are different aquariums and aquatic animals within the one cannot naturally move to the other.

10. The Lost River sucker and the shortnose sucker were declared endangered under the ESA in 1988 (53 C.F.R. 27130-27135). Both species have been found in the various bodies of water of the Klamath Project, including Clear Lake reservoir, but only the shortnose sucker has been found in Gerber reservoir.

11. Critical habitat for these species of suckers has never been determined by the Secretary, despite the ESA's mandate that he do so "to the maximum extent prudent and determinable" under 16 U.S.C. § 1533(a)(3) at the same time the Secretary declares them endangered. Defendants are responsible for determining critical habitat.

12. The BOR has been following essentially the same procedures for storing and releasing water from

Clear Lake and Gerber reservoirs throughout the twentieth century, up to the present day. No natural phenomenon or human activity has substantially modified the aquatic environments of Gerber reservoir and Clear Lake reservoir since their construction except that the Department of Fish & Game of the State of California installed the Sacramento Perch within the Clear Lake Reservoir.

13. There is no scientifically or commercially available evidence indicating that the populations of endangered suckers in Clear Lake and Gerber reservoirs have declined, are declining, or will decline as a result of any natural phenomena or human activities, including the operations of the BOR in the Klamath Project. To the contrary, the scientifically and commercially available evidence indicates that the populations of endangered suckers in Clear Lake and Gerber reservoirs are not declining and are reproducing successfully.

14. As a result of concerns over population declines of the endangered suckers in the Klamath River system in the western portion of the Klamath Project, the BOR initiated consultation with the Fish and Wildlife Service in 1990 pursuant to section 7 of the ESA, 16 U.S.C. § 1536. The Biological Opinion is the result of that consultation and was issued pursuant to section 7(b)(3)(a) of the ESA, 16 U.S.C. § 1536(b)(3)(a).

15. The Biological Opinion makes the following conclusion:

Biological Opinion

It is our biological opinion that the long-term operation of the Klamath Project as described under the *Description of the Proposed Action*, is

likely to jeopardize the continued existence of the Lost River and shortnose suckers. It is our biological opinion that the proposed Project operation is not likely to jeopardize the continued existence of the bald eagle. Critical habitat has not been designated for any of these three species.

p.2.

16. The Biological Opinion notes that "Both Lost River and shortnose suckers are long-lived, highly fecund, and well adapted to surviving drought conditions." (Biological Opinion, p. 18). The Biological Opinion points out that sucker habitat in Clear Lake differs from that in the western portion of the Project, at Klamath Lake and Upper Klamath Lake, "because Clear Lake appears to have relatively stable sucker populations, has virtually no aquatic vegetation, and exhibits wider fluctuations in lake elevations during most years." (Biological Opinion, p. 18). The Biological Opinion attributes the stability of the sucker populations in Clear Lake to its good water quality, in comparison to the poor water quality in Klamath Lake and Upper Klamath Lake, where sucker populations have declined. (Biological Opinion, p. 18).

17. The Biological Opinion admits that little is known about the endangered sucker population in Gerber reservoir, although a study in May of 1992 found over 200 shortnose suckers with a broad range in size, "... which indicates that the population of shortnose suckers in Gerber reservoir has successfully recruited in the last few years ..." (Biological Opinion, p. 20). The May 1992 study also found some evidence of stress in the

collected specimens, possibly due to low reservoir levels. (Biological Opinion, p. 20). The Biological Opinion notes that 1992 was one of a series of low water years, and that the 17-foot depth of Gerber reservoir at its lowest level, likely to be reached in October, 1992, should be sufficient to maintain a population of suckers. (Biological Opinion, p. 20).

18. Without any supporting citations, the Biological Opinion states:

Formally (*sic*) stable populations, such as those in Clear Lake, are now threatened by drought related stresses. Without proposed improvements in water quality and sucker habitat, the future of these suckers is imperiled and the present status of habitat condition makes extinction in most of their current range highly likely.

p. 26.

19. Despite its conclusion that both Clear Lake and Gerber reservoirs have stable populations of endangered suckers which are reproducing successfully during the present drought years, the Biological Opinion imposes restrictions on the withdrawal of water from both reservoirs. Except for compromise years, the restrictions applicable to Clear Lake reservoir include a minimum lake level of 4524.0 feet between February 1 and April 15 annually, during the spawning season, and a minimum lake level of 4523.0 feet during the remainder of the year. (Biological Opinion, at 37). Except for compromise years, the restrictions applicable to Gerber reservoir permit no water releases below 4799.6 feet. (Biological Opinion, at 38).

20. There is no commercially or scientifically available evidence indicating that the restrictions on lake levels imposed in the Biological Opinion will have any beneficial effect on the stable, successfully reproducing populations of suckers in Clear Lake and Gerber reservoirs.

21. The restrictions on lake levels imposed in the Biological Opinion adversely affect plaintiffs by substantially reducing the quantity of available irrigation water.

22. By imposing restrictions on lake levels in Clear Lake and Gerber Reservoirs, the Biological Opinion implicitly determines critical habitat for the endangered suckers. The Biological Opinion does not take into consideration the economic impact of that determination, as required by § 4 of the ESA, 16 U.S.C. § 1533(b)(2). There is abundant commercially and scientifically available evidence as to the substantial negative economic impact of designating the critical habitat of the endangered suckers at the lake levels set by the Biological Opinion.

CLAIMS FOR RELIEF
FIRST CLAIM FOR RELIEF
VIOLATION OF THE ENDANGERED SPECIES ACT
VIOLATION OF THE ADMINISTRATIVE
PROCEDURE ACT

1. Plaintiffs reallege paragraphs 1 through 22 above.
2. Defendants have violated § 7 of the ESA, 16 U.S.C. § 1536, and its implementing regulations, 50 C.F.R. Part 402, by improperly concluding on page 2 of the Biological Opinion that the BOR's continued operation of the Klamath Project, including Clear Lake and Gerber

reservoirs, is likely to jeopardize the continued existence of the Lost River and shortnose suckers. Defendants' violation of the ESA is subject to judicial review under section 11(g) of the ESA, 16 U.S.C. § 1540(g)(1)(C).

3. Defendants' inclusion of Clear Lake and Gerber reservoirs in its jeopardy opinion is arbitrary, capricious, and an abuse of discretion, and violates the APA, 5 U.S.C. § 706(2)(A). Defendants' violation of the APA is subject to judicial review under 5 U.S.C. § 701 *et seq.*

SECOND CLAIM FOR RELIEF
VIOLATION OF THE ENDANGERED SPECIES ACT
VIOLATION OF THE ADMINISTRATIVE
PROCEDURE ACT

1. Plaintiffs reallege paragraphs 1 through 22 above.
2. Defendants have violated § 7 of the ESA, 16 U.S.C. § 1536, and its implementing regulations, 50 C.F.R. Part 402, by improperly imposing restrictions on the withdrawal of irrigation water from Clear Lake and Gerber reservoirs, as specifically set forth in paragraph 19 above. Defendants' violation of the ESA is subject to judicial review under section 11(g) of the ESA, 16 U.S.C. § 1540(g)(1)(C).
3. Defendants' imposition of restrictions on the withdrawal of irrigation water from Clear Lake and Gerber reservoirs is arbitrary, capricious, and an abuse of discretion, and violates the APA, 5 U.S.C. § 706(2)(A). Defendants' violation of the APA is subject to judicial review under 5 U.S.C. § 701 *et seq.*

THIRD CLAIM FOR RELIEF
VIOLATION OF THE ENDANGERED SPECIES ACT
VIOLATION OF THE ADMINISTRATIVE
PROCEDURE ACT

1. Plaintiffs reallege paragraphs 1 through 22 above.
2. Defendants have violated § 4 of the ESA, 16 U.S.C. § 1533(b)(2), and its implementing regulations, 50 C.F.R. Part 402, by implicitly determining critical habitat for the Lost River suckers and the shortnose suckers in Clear Lake and Gerber reservoirs, as more specifically alleged in paragraph 21 above, without considering the economic impact of that determination. Defendants' violation of the ESA is subject to judicial review under section 11(g) of the ESA, 16 U.S.C. § 1540(g)(1)(C).
3. Defendants' failure to consider the economic impact of its critical habitat determination is arbitrary, capricious, and an abuse of discretion, and violates the APA, 5 U.S.C. § 706(2)(A). Defendants' violation of the APA is subject to judicial review under 5 U.S.C. § 701 *et seq.*

PRAYER FOR RELIEF

WHEREFORE, plaintiffs request the Court to:

A. Adjudge and declare that defendants have violated the Endangered Species Act and the Administrative Procedure Act by including Clear Lake reservoir and Gerber reservoir in the jeopardy conclusion on page 2 of the Biological Opinion of July 22, 1992.

B. Adjudge and declare that defendants have violated the Endangered Species Act and the

Administrative Procedure Act by improperly imposing restrictions on the withdrawal of irrigation water from Clear Lake and Gerber reservoirs in the Biological Opinion of July 22, 1992.

C. Adjudge and declare that defendants have violated the Endangered Species Act and the Administrative Procedure Act by implicitly determining critical habitat for the Lost River suckers and the shortnose suckers in Clear Lake and Gerber reservoirs in the Biological Opinion of July 22, 1992, without considering the economic impact of that determination.

D. Set aside the Biological Opinion of July 22, 1992, as unlawful and void of force under the ESA and the APA.

E. Award plaintiffs their reasonable fees, costs and disbursements, including attorney fees.

F. Grant plaintiffs such further and additional relief as the Court may deem just and proper, including injunctive relief pursuant to 16 U.S.C. Section 1540(g)(1)(A) to implement the foregoing.

Dated:

William F. Schroeder,
Larry A. Sullivan,
John T. Schroeder,
W. Alan Schroeder.

By _____
W.F. Schroeder
Plaintiffs' lawyers.

EXHIBIT B (To Complaint for
Declaratory and Injunctive Relief)

[SEAL]

UNITED STATES DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE

911 N.E. 11th Avenue
Portland, Oregon 97232-4181

In Reply Refer To: JUL 22 1992
1-1-92-F-34

Memorandum

To: Regional Director, Bureau of Reclamation
Sacramento, California

From: Regional Director, Fish and Wildlife Service
Region 1, Portland, Oregon

Subject: Formal Consultation on the Effects of the
Long-term Operation of the Klamath Project on
the Lost River Sucker, Shortnose Sucker, Bald
Eagle, and American Peregrine Falcon

Introduction:

This biological opinion has been prepared pursuant to the United States Department of the Interior Agreement on compliance with the Endangered Species Act dated June 11, 1991. This agreement is considered a request for formal consultation pursuant to section 7 of the Endangered Species Act of 1973, as amended (Act), on the Bureau of Reclamation's (Reclamation) continuing long term operation of the Klamath Project (Project). We received your Biological Assessment on February 28, 1992. At issue are the effects of proposed long term operations of the Project on two federally listed endangered fishes, the Lost River sucker (*Deltistes luxatus*) and shortnose sucker (*Chasmistes*

brevirostris), and the bald eagle (*Haliaeetus leucocephalus*). The bald eagle is listed as federally endangered in California and threatened in Oregon. Although the area affected by Project operations is within the range of the American peregrine falcon (*Falco peregrinus anatum*), this species likely will not be affected by the Project proposal. Thus, the American peregrine falcon will not be addressed in this consultation.

Provision of water pursuant to the operations of the Klamath Project affects the endangered species resources both within and outside the Project service area. In the case of Project operations, the effects of the action extend to those areas where water is actually delivered (the Project service area) and to all other areas directly or indirectly affected by Project water delivery. The effects of long-term Project operation also extend to areas affected by reductions in Klamath River water as a result of the operation of Project facilities. Areas affected by reductions of Klamath River outflow include the Link River, Lake Ewauna, Lower Klamath Lake, irrigation operations that divert water from the Klamath River, and the Klamath River downstream of Lake Ewauna.

The direct, indirect, interrelated, and interdependent effects of the action, and cumulative effects, are added to the environmental baseline that is evaluated together with the current status of the species or critical habitat to ascertain the likelihood of a given action jeopardizing the continued existence of the listed species or adversely modifying or destroying critical habitat under consideration. The environmental baseline includes the past and present effects of all Federal, State, or private actions and other human activities in the action area, the anticipated

effects of Federal actions that have undergone formal or early Section 7 consultation, and the impact of State and private activities that are contemporaneous with the consultation process. In examining the current status of a listed species, the Service considers the species' needs, including its breeding, feeding, and sheltering requirements.

This biological opinion is based on (1) information presented in Reclamation's Biological Assessment, dated February 28, 1992 (USBR 1992), and its appendices; (2) Information presented in all previously released biological opinions dealing with aspects of the operation of the Project; (3) Information collected from Reclamation in meetings and telephone conversation on aspects of the operation of the Project, or on current results of field research activities; (4) Information provided by various published and unpublished reports on the biology, distribution, systematics, and status of species and their ecosystems found in the Project area; (5) Communications with field researchers who have conducted, or are now conducting, research on the biology of the species found in the Project area, or their ecosystems.

Biological Opinion

It is our biological opinion that the long-term operation of the Klamath Project as described under the *Description of the Proposed Action*, is likely to jeopardize the continued existence of the Lost River and shortnose suckers. It is our biological opinion that the proposed Project operation is not likely to jeopardize the continued existence of

the bald eagle. Critical habitat has not been designated for any of these three species.

Description of the Proposed Action

The proposed action, the long-term operation of the Project, combined with the mitigation measures to be included in the action is described in the February 28, 1992, biological assessment for this project and is hereby incorporated by reference.

Conservation Actions:

At a meeting on 4 June 1992 between Reclamation and Service personnel, the Klamath Project Office agreed to include the following mitigation measures in their "Description of Action". By including these actions, Reclamation demonstrates a commitment to the survival and recovery of the endangered species that exist in the Project area. These mitigation measures were originally described in the Biological Assessment as "Possible Mitigation Measures", or were developed with the assistance of the Service as actions likely to enhance survival and recovery of listed species. Data collected during these studies may be used as a basis for re-initiation of consultation.

Mitigation Measures Included in the Action:

1) Sucker Toxicity Studies

Bioassay work on both larval and juvenile suckers is essential information for the decision making process. By

determining lethal tolerances for dissolved oxygen, temperature, ammonia, pH, and algal toxins singly and combined, the ability to assess habitat availability (based on water quality) will be gained. This information will have many uses such as: when and where to release hatchery fish, setting goals for water quality management, etc. Reclamation has contracted with the USFWS Research Station, Dixon, California, to do this work in 1992.

2) Life History, Population Dynamics, and Environmental Factors Affecting the Suckers

This study would provide for the continuation of current research that will culminate in recovery and management recommendations for Lost River and shortnose suckers in the Lost River watershed and the Klamath River system down to Iron Gate Dam by 1996. Reclamation will participate and cost share in (a) continue distribution surveys, life history, and population studies begun in Clear Lake in 1989; (b) extend distribution surveys to include the entire Lost River system (i.e., into Oregon) and the Klamath River system downstream to Iron Gate Dam; (c) describe seasonal distribution and habitat use by different life stages; and (d) define preferred habitat for major life stages and their correlation with water quality, depth, and flow. Items a through d will be coordinated among the California Department of Fish and Game (CDFG), Oregon Department of Fish and Wildlife (ODFW), and the Seattle National Fisheries Research Laboratory, Reno Office.

3) Assess External Nutrient Loading to Upper Klamath Lake

The overall objective is to assess sources of external nutrient loading to the lake and the role reservoir regulation has had on flushing patterns in the lake. The other major emphasis of the work will be to assess nutrient flux to the lake from shallow ground water.

Nutrient loading to the lake from small streams, ditches, and canals is currently being assessed by Reclamation and the Klamath Tribe. The U.S. Geological Survey was just contracted by the Project Office to complete a 5 year study to determine loading from the major streams, determine the ground water component, compile input from Reclamation and the Klamath Tribe, and investigate the role of reservoir regulation in nutrient dynamics.

4) Compilation and Analysis of Past Water Quality Investigations in the Klamath Basin

Through the years many studies have been conducted in connection with water quality in the Basin. To date no comprehensive compilation or analysis of these data has been done. Investigation into the data collected by these studies may provide fruitful (and relatively inexpensive) insight. Further, these data will provide a valuable baseline for ecosystem recovery efforts by allowing comprehensive modeling of the basin and drainage system, water and nutrient inputs, and of water use demands. Reclamation will assist in the efforts.

5) Taxonomy of Klamath Basin Suckers

A critical need in any recovery program for the Klamath Basin suckers is the ability to identify individual fish at

all life history stages and know the taxonomic status of the sucker species. A combination of morphological and molecular approaches to this problem is most likely to produce useful results. A full-time effort by a molecular systematist and a morphological systematist is necessary to build from the current uncertain knowledge base and resolve the specimen identification problem. Reclamation is currently funding Oregon State University to perform much of this work. The CDFG has contracted the University of California, Los Angeles, to complete some as well.

6) Monitor Spawning Usage at Springs

In 1991 Reclamation placed gravel in several discrete areas with a mixture of larger rock in an attempt to more closely matches preferred spawning substrate sizes reported by Buettner and Scoppettone (1990) and observed by Tribal biologists. Sucker Springs now has a variety of substrate sizes available for spawning suckers to select among. Reclamation, in cooperation with the Klamath Tribe, will monitor Sucker Springs and other spring areas to assess relative intensity of use and relative habitat quality among the different substrate types. This will refine our understanding of the spawning substrate and habitat needs of these fish which should allow future enhancement work to be based on hard data which should result in more effective habitat improvement. Reclamation will conduct and/or assist the Klamath Tribe in conducting ongoing monitoring studies to determine at what water depth, size of gravel substrate, water temperature, pH, and dissolved oxygen concentrations lake-spawning populations of Lost River and shortnose suckers spawn and emerge. Current spawning material at Sucker Springs is placed relatively high with respect to

lake levels. The placement of additional material at lower levels may provide spawning opportunities in the event of lower water levels, but increasing water levels during the spawning and incubation period could reduce the viability of eggs buried in the gravels at lower levels. Reclamation intends to place gravels at lower elevations this fall and monitor sucker use and egg viability. The Project will investigate other options to improve spawning conditions at Sucker Springs to provide favorable conditions at various lake elevations. These studies will include the 1993 spawning season and continue until the recovery team determines that the needed information has been obtained. Reclamation will use this information to improve spawning habitat at Sucker Springs and other springs where these fish spawn.

7) Locate Springs in Upper Klamath Lake and Enhance the Substrate Conditions to Create Sucker Spawning Habitat

Large springs are known to be present in Upper Klamath Lake. Locating the springs and evaluating their suitability for sucker spawning to determine if adding sufficient quantities of suitable gravels over the springs could create suitable sucker spawning habitat will be coordinated with the Klamath Tribe and ODFW. This work would be completed by March of 1994.

8) Spawning Enhancement in the Vicinity of Barkley Springs (Upper Klamath Lake)

Historically Barkley Springs was the site of prolific spawning activity. Thirty years ago Hagelstein Park was developed by Klamath County in the immediate vicinity of the springs. Construction of the park included diking,

ponding and the rerouting of water. This caused spawning to essentially cease, although it has been reported that as late as 1973 great numbers of suckers attempted to reach this traditional spawning ground.

This project would include the compilation of baseline usage data, replacement of gravel, land surveys, hydraulic design, construction of passage facilities and subsequent monitoring of use. Klamath County is very supportive of any enhancement work and would be willing to assist. The site is also the source of water for one irrigator and any work may need to include alterations of pumping and/or diversion facilities to allow for meeting both needs. This work would be completed in time for the sucker spawning runs in March of 1993.

9) Assess Methods to Improve Passage in the Sprague River.

The construction of the Sprague River dam near Chiloquin effectively blocked approximately 95% (70 river miles) of the potential spawning range of the Lost River and shortnose suckers in Upper Klamath Lake. The dam was constructed in 1914-1918 by the Klamath Agency with assistance from the Bureau of Indian Affairs. The dam provides water diversion for 5300 acres of irrigable land in the Modoc Point Irrigation District.

The Nature Conservancy has completed a study for the Service to determine the cost and feasibility of alternative strategies that would provide fish passage for suckers around the dam. Reclamation proposes to further examine the issue, to the extent of developing engineering plans for various alternatives. These plans will help to further assess the costs of such a project, determine which

alternative will have the greatest chance of providing the passage the fish need and methods for implementing that alternative. If a feasible plan is determined before March, 1993, Reclamation will attempt to implement it before spawning in 1993.

10) Assess Marsh Restoration

Reclamation will participate in experimental pilot projects within three to five years to assess the potential for restoring marshlands around Upper Klamath Lake and to determine if this will improve water quality, sucker habitat, and/or survival. These actions will be coordinated with the Service, the Tribe, and ODFW.

11) Determine Prey Species and Foraging Distribution of Bald Eagles at Gerber Reservoir, Due to Drought Stresses.

Because of competition due to reduced foraging area or if reservoir levels remain at minimum pool, one of the two nesting pairs may be forced out of Gerber Reservoir and may forage at a nearby reservoir. During the nesting season nearby reservoirs, such as Upper Midway, Round Valley, Dog Hollow, and others, could be monitored for eagles foraging and bringing prey back to nests at Gerber. If it was found that limited forage was affecting reproductive efforts, a supplemental feeding program could be initiated for the nesting eagles. Reclamation has contracted the Bureau of Land Management (BLM) to accomplish this work and monitoring is in progress.

12) Support the USFWS Ecosystem Recovery for Klamath Basin

Reclamation will assist the Service in the development and implementation of workshops or symposia to educate the public, water users, agency personnel, and other interested parties in the nature of Klamath ecosystem problems, symptoms, solutions, and recovery. These workshops will be invaluable for establishing public involvement in the recovery process, and will provide a forum for the gathering of meaningful data by the recovery team and the Service.

13) Investigate a New Channel at the Mouth of Willow Creek into Clear Lake

Concern has been expressed by the U.S. Fish and Wildlife Service that during periods of low water levels in Clear Lake, suckers emigrating from Willow Creek likely follow the existing channel out of Willow Creek down toward the dam where they may entrained through the dam. Reclamation will investigate moving the mouth of Willow Creek further south into the more central part of the east lobe of the lake to avoid this potential hazard. Reclamation will also investigate the lake elevation required for spawning access and larval dispersal from Willow Creek.

14) Genetic Relationships

Management of the endangered Lost River and shortnose suckers has been complicated by the suggestion that variable morphological characteristics in both species may be the result of hybridization and introgression among these and two other Klamath Basin suckers, the largescale and

smallscale sucker. Within 2 years of issuance of this biological opinion, Reclamation will assist the Service, ODFW, CDFG, and the Klamath Tribe, in designing a comprehensive taxonomic study and contribute financial support for it. This study is designed to determine the genetic relationship among four Klamath Basin sucker species, differences within the endangered species, and whether or not these species are presently hybridizing or may have hybridized in the past. This information could be used to improve management of the different populations of endangered suckers and is essential for any future hatchery operations.

15) Watershed Improvement

Within 2 years of issuance of this biological opinion, Reclamation will develop and begin to implement a long-term plan to restore riparian areas along Upper Klamath Lake tributaries and marshland habitat adjacent to Upper Klamath Lake with a goal of improved water quality conditions, water storage capacity, and habitat for all life stages of endangered suckers in Upper Klamath Lake. The long-term plan will be developed in cooperation with the Service, Soil Conservation Service, ODFW, the Klamath Basin Steering Committee, Klamath County, the Klamath Tribe, and other agencies with statutory responsibilities for protection of State and federally listed endangered species and improving water quality. The plan will establish water quality goals, an implementation time schedule, and a budgeting strategy that will assure adequate funding to share costs of securing and protecting marshland and riparian habitat through willing-seller acquisition, conservation easement or other options. Critical areas could be secured in the initial

implementations and a total acreage goal established after needed information is received from pilot projects and other research. Full implementation of this plan will be reviewed at 5 year intervals to determine status of implementation based upon existing information.

16) Internal Nutrient Loading

Within three to five years of issuance of this biological opinion, Reclamation will participate in developing, conducting, and providing technical and financial support for a study of internal nutrient loading in Upper Klamath Lake to help identify possible solutions to the lake's water quality problems and provide information for a complete nutrient budget. This information will be used to identify and implement where possible measures to reduce total nutrient loading.

17) Recruitment Study

Recruitment failure in Lost River and shortnose suckers in Upper Klamath Lake appears most severe between larval and adult life stages. Reclamation will lead an investigation of the interrelationships of lake level, juvenile sucker habitat (including emergent marsh), and recruitment success. It is anticipated that the results of this study will provide information on the observed or potential response of sucker populations to lake level fluctuations and may be used in later refinement of lake level management practices.

18) Investigate the Feasibility of New Storage

Reclamation, working jointly with the Service, will develop a feasibility study to investigate reducing evaporation and/or increasing storage in the Lost River

system for the purposes of increasing water supplies for: 1) Refuges, 2) downstream water needs, 3) endangered suckers, 4) more stable irrigation supplies, 5) other wildlife resources.

19) Monitor Refugial Areas

Reclamation will study potential refugial areas (including Pelican Bay, Williamson River, Wood River and other sites as they are identified) in Upper Klamath Lake to determine the extent and conditions of sucker utilization of these habitats. Water quality will be monitored in and around these refugial areas to determine the suitability of these refuge sites. This study will begin during the summer of 1992 to determine the availability and suitability of refugial areas during low water conditions.

20) Re-evaluate the Flood Plan

Reclamation is in the process of re-evaluating the flood plan and flood capacity of Tule Lake and will use this information to evaluate the safety of the operations outlined in the reasonable and prudent alternatives described below for Tule Lake. If the results of this study indicate a safety concern, consultation will be re-initiated.

Species Accounts/Environmental Baseline

The following section provides information on the current status of the listed species addressed in this biological opinion and anticipated trends in habitat availability. The information presented in this section is the basis against which the effects of the action are measured over the life of the action.

This section of the biological opinion was prepared with information from the following sources: 1) Reclamation's February 28, 1992 Biological Assessment on Long-Term Operations of the Klamath Project; 2) The Service's August 14, 1991 Biological Opinion on the Effects of the 1991 Operation of the Klamath Project on the Lost River sucker, the shortnose sucker, Bald Eagle, and American Peregrine Falcon; 3) Communications with field researchers who have conducted, or are currently conducting, research on the listed suckers; 4) Communications with Reclamation personnel and applicants. It should be noted that some of the personal communications cited occurred between the authors of the Project Biological Assessment and the researcher. In citing these communications, the Service may not have been able to further verify the information discussed.

Species Accounts:

Bald Eagle

The bald eagle is a generalized predator/scavenger primarily adapted to edges of aquatic habitats. Its primary foods, in descending order of importance, are fish (taken both alive and as carrion), waterfowl, mammalian carrion, small birds, and mammals. The species is long-lived, and individuals do not reach sexual maturity until 4 or 5 years of age. Further general description of the species' biology may be found in Palmer (1988).

The bald eagle once nested throughout much of North America near coasts, rivers, lakes, and wetlands. The species suffered population declines throughout most of its range, including Oregon and California, due primarily

to habitat loss, shooting, and environmental pollution (Snow 1973, Detrich 1986, U.S. Fish and Wildlife Service 1986, Stalmaster 1987). The drastic decline of this species led to its listing for protection under the Act on February 14, 1978 (Federal Register 43: 6230-6233). The species is listed as endangered in 43 states, including California, and as threatened in 5 states, including Oregon. Bald eagles are sensitive to human disturbances such as recreational activities, homesites, campgrounds, mines, and timber harvest near roosting, foraging, and nesting areas (Thelander 1973, Stalmaster and Newman 1976, U.S. Fish and Wildlife Service 1986).

In recent years, the status of bald eagle populations has improved throughout the United States. In 1990, the Service published an advance notice of a proposed rule (Federal Register 55:4209-4212) which would reclassify the species from endangered to threatened throughout the lower 48 states. The Pacific Region Bald Eagle Recovery Team has found that reclassifying the species as threatened is justified in the 7 northwestern States (California, Oregon, Washington, Idaho, Montana, Wyoming, and Nevada) comprising the Pacific Recovery Region (Steenhof 1990). The Klamath Basin is one of 45 Recovery Zones in this Recovery Region.

Bald eagle populations in the Klamath Basin include 3 groups: breeding adult pairs, nonbreeding immature and subadults, and migratory adults which breed in other areas. Following is a brief discussion of the biology and status of each of these groups.

In 1990, the Klamath Basin Recovery Zone contained 79 occupied breeding sites, nearly equalling the Bald Eagle

Recovery Plan (Recovery Plan) population goal of 80 for the zone (Steenhof 1990). Mean reproduction among this population over the past 5 years has been 0.93 young per occupied site (Isaacs and Anthony 1990), which is near the standard of 1.0 set by the Recovery Plan. Adult bald eagle pairs begin egg-laying between early March and mid-April; eggs are incubated for 5 weeks before hatching. Eaglets remain on the nest for 10 to 12 weeks before their first flight. Bald eagle nesting pairs which may be affected by the project include 2 pairs at Gerber Reservoir and over 30 pairs at Upper Klamath Lake.

The Klamath Basin is known to provide summer habitat for nonbreeders from other zones (Jackman pers. comm.), and large numbers of nonbreeders and adults from throughout the Pacific Northwest migrate into the Basin during the late fall and winter months. Winter counts during the 1980's have ranged from 500 to 1000 eagles (Opp pers. comm.), making this one of the most important wintering areas in the continental United States. The primary prey base for wintering eagles in the Klamath Basin is waterfowl and small mammals (Frenzel 1984). Areas used for foraging include both privately-owned agricultural lands and State and Federal wildlife refuges.

The prolonged presence of predator/scavengers such as bald eagles in the project area is an indication of a relatively consistent availability of prey. In addition to influencing presence of eagles, prey availability also influences eagle reproductive rates, because the pre-breeding condition of a female raptor determines its ability to produce eggs (Newton 1979), and because food must be available not only for the adults but for their

young. Thus, bald eagles must obtain enough food during the winter to come into breeding condition in early spring, support 5 weeks of incubation, and provide food for nestlings and fledglings for about 4 months. Lack of food at various points in the breeding cycle may inhibit nesting attempts, cause abandonment of the nesting effort, or result in starvation of young. Bowerman (1986) documented low bald eagle reproduction in years following removal of rough fish by rotenone treatments in northern Michigan, and a similar result was observed in years following rotenone treatment of a northern California reservoir. In 1990, ospreys (which are also piscivorous) abandoned young at Oregon's Hyatt Reservoir, where rotenone treatment had dramatically reduced prey abundance and availability.

Reproductive rates are also subject to several secondary variables, including weather, contaminants, and disturbance factors. Because bald eagles evolved in the climate of the Pacific Northwest, weather is believed rarely to be a serious factor. Serious storms that occur at the time of incubation or hatching create an exception. Low productivity in the Klamath Basin in 1982 was believed to be the result of such storms (Frenzel 1984). While several persistent contaminants have been documented in eagle tissues in the project area, Frenzel (1984) concluded that contaminant levels had no significant effect on the area's bald eagle reproduction in the early 1980's. Human disturbance may be a factor at certain sites, but is not believed to be pervasive in the project area. None of these factors appear to impose serious limits on eagle populations at the present time.

In the absence of the above secondary effects, prey availability is believed to be the primary limiting factor for these eagle populations. Prey becomes available to bald eagles in two ways: (1) when the behavior of a live individual prey item makes it available for capture, such as a fish basking or feeding near the water surface; or (2) when the carcass of a dead individual is available on the ground, on ice, in shallow water, or floating at the water surface. Only a portion of available prey is actually discovered and taken before it becomes unavailable. The number of available prey items is, therefore, a function of prey population size, expressed through prey behavior and mortality rates.

In the Klamath Basin, there are three major classes of prey: (1) fish, breeding waterfowl, and small mammals available during the eagle breeding season; (2) concentrations of migratory waterfowl available to eagles during the fall and winter months; and (3) small mammals made available due to irrigation flooding during late winter months. Each of these forage classes is influenced by water management.

At Upper Klamath lake, important prey species during the eagle nesting season include tui chub (*Gila bicolor*), blue chub (*G. coerulea*) and suckers (Frenzel 1984). Species composition of eagle prey at Gerber Reservoir has not been documented. The reservoir's fishery resource consists largely of introduced species such as crappie, perch, bass, and also includes rainbow trout and native suckers.

Irrigation deliveries throughout the system eventually reach the National Wildlife Refuges and direct water

deliveries are made from Upper Klamath Lake and the Klamath River to the Refuges, providing habitat for hundreds of thousands of migratory waterfowl. These waterfowl provide the primary prey base for the hundreds of migratory eagles which visit the Basin during the winter months.

Lost river and Shortnose Sucker

Surveys carried out in the Klamath Basin prior to and after the construction of Reclamation's Klamath Project and Link River Dam indicated that sucker populations were very large. Cope (1879) described the Lost River sucker and shortnose sucker from specimens he had gathered from Upper Klamath lake. Both species are endemic to the Klamath Basin. Cope (1884) later noted that Upper Klamath Lake sustained "a great population of fishes" and was "more prolific in animal life" than any body of water known to him at that time. Gilbert (1898) noted that the Lost River sucker was "the most important food-fish of the Klamath Lake region." At that time, spring sucker runs "in incredible numbers" (Gilbert 1898) were relied upon as a food source by the Klamath and Modoc Indians and were taken by local settlers for both human consumption and livestock feed (Cope 1879, Coots 1965, Howe 1968). Sucker runs were so numerous, in fact, that a cannery was established on the Lost River (Howe 1968) and several other commercial operations processed "enormous amounts" of suckers into oil, dried fish, and other products (Andreasen 1975). Even through the 1960's and 1970's, runs of suckers up the Williamson and Sprague Rivers were great enough to support a popular sport fishery (Fortune per. comm.). The first concerns

were expressed over declining sucker populations in the 1960's (Vincent 1968, Golden 1969). Surveys conducted in 1984-1986 indicated a major decline in Lost River and shortnose sucker populations (Bienz and Ziller 1987) and the fishery was closed in 1987. Both Lost River and shortnose suckers were federally listed as endangered species on July 18, 1988 (Federal Register 53:27130-27134). Because the Lost River sucker is the only species in the genus *Deltistes*, this entire genus is endangered as well.

Reclamation's biological assessment describes in detail the taxonomy and identification of Lost River and shortnose suckers (USBR 1992).

Over 100,000 of the 240,000 project irrigated acres were marshlands prior to project actions. The conversion of these wetlands to agriculture has reduced the amount and presumably the quality of habitat available to the suckers. Project and non-project irrigation has decreased inflows into the lakes and rivers and increased nutrient loading from return flows, which has contributed to the hypereutrophic condition of most of the water in the Upper Klamath Basin (USGS 1991).

Distribution

Lost River sucker

The Lost River sucker is native to Upper Klamath Lake (Williams et al. 1985) and most of its tributaries, including the Williamson, Sprague, and Wood rivers, Crooked Creek, Seven Mile Creek, Four Mile Creek, Odessa Creek, and Crystal Creek (Stine 1982). It is also native to the Lost

river system, Lower Klamath Lake, Sheepy Lake (Williams et al. 1985), and Tule Lake (Stine 1982). The present distribution of Lost River suckers includes Upper Klamath Lake and its tributaries (Buettner and Scopettone 1990), Clear Lake Reservoir and its tributaries (Buettner pers. comm.), Upper Klamath River downstream to Copco Reservoir (Coots 1965, Beak 1987) and Tule Lake (Scopettone, pers. comm.). A few individual Lost River suckers were observed spawning in the Lost River below the Anderson Rose Dam in 1991, and it is presumed that these individuals migrated from Tule Lake, where 20 adults and one juvenile have been captured this year (Scopettone pers. comm.). Larval Lost River suckers were collected in the Wood River and Crooked Creek in 1991 (Logan pers. comm.) which indicates a spawning run still occurs these streams. Suckers have been reported from Sheepy lake in 1988 and may represent a resident population but positive species identifications were not made (Johnson pers. comm.).

Shortnose sucker

The historic distribution of the shortnose sucker is Upper Klamath Lake and its tributaries (Miller and Smith 1981; Williams et al. 1985), Lake of the Woods (Moyle 1976), and possibly the Lost River drainage. Shortnose suckers now inhabit the same waters as the Lost River Suckers and additional sites, including the Lost River, and Gerber Reservoir. Shortnose suckers have also been collected on the Upper Klamath River from Copco Reservoir to the Link River Dam. Shortnose suckers found in Gerber Reservoir and Clear Lake show some morphological differences from those found in Upper Klamath Lake and

Copco Reservoir (Buettner pers. comm). Starch gel enzyme electrophoresis revealed differences between the shortnose sucker populations in Clear Lake and Upper Klamath Lake (Moyle and Berg 1991). Their presence in the Lost River is well documented and spawning has been observed in Bonanza Springs in the past and in 1992 (Buettner pers. comm.), although at least one researcher has stated that it is unlikely that a viable population exists within the river (Stine 1982). Shortnose suckers were observed spawning below Anderson Rose Dam in 1991, and it is presumed that these individuals migrated from Tule Lake, where 18 adults were captured this year (Scoppettone pers. comm.).

Little is known about the endangered sucker population inhabiting Gerber Reservoir. In May of 1992, Over 200 shortnose suckers were collected ranging in size between 78 and 461 mm FL. This indicates that the population of shortnose suckers in Gerber reservoir have successfully spawned in the last few years (Buettner pers. comm). Juvenile suckers (less than 100 mm) were observed in Barnes Valley Creek in 1992, indicating successful reproduction in the creek in 1991 (Buettner, pers. comm.).

Reason for Decline

Lost River and shortnose suckers

Not all of the factors responsible for the decline of these species are clear, but they are thought to include the damming of rivers, dredging and draining of marshes, instream flow diversions, over-harvest, introductions of non-native fish, and a shift toward hypereutrophication and poor water quality in Upper Klamath Lake and

waters downstream. These factors may affect populations in different waterbodies to different degrees. Some of these conditions are difficult to control or reverse. A recent analysis of the population genetics of the Lost River sucker and shortnose suckers (Moyle and Berg 1991) suggested that "if populations continue to decline, these species may cross below the minimum viable population threshold and be lost." Entire stocks may have already been lost [e.g., Harriman Springs, Barkley Springs (Andreasen 1975, Bond pers. comm., Buettner pers. comm.)]. The largest remaining populations of Lost River and shortnose suckers are believed to occur in Upper Klamath Lake and Clear Lake (Scoppettone pers. comm.).

Age and Growth

Lost River suckers

Scoppettone (1988) aged Lost River suckers from Upper Klamath Lake up to 43 years old. Lost River suckers are one of the largest sucker species and may obtain a length of up to 1 meter in total length (Moyle 1976). Sexual maturity for suckers sampled in Upper Klamath Lake occurs between the ages of 6 to 14 years, with most maturing at age 9, with most growth in Upper Klamath Lake occurring mainly during the first 8 to 10 years of life (Buettner and Scoppettone 1990).

Shortnose suckers

Scoppettone (1988) found shortnose suckers up to 33 years of age from Copco Reservoir. Sexual maturity for

shortnose suckers appears to occur between the ages of 5 and 8 with most maturing at the age of 6 or 7 (Buettner and Scopettone 1990). Buettner and Scopettone (1990) found that for female shortnose suckers sampled from Upper Klamath Lake, most growth occurred in the first 6 to 8 years of life.

Reproduction

Lost River and shortnose suckers are lake suckers that generally spawn in rivers or streams and then return to the lake. However, both species have separate populations that spawn near springs in Upper Klamath Lake (Scopettone pers. comm.). More detailed spawning information for both sucker species is given in the biological assessment (USBR 1992).

Upper Klamath Lake Endangered Sucker Populations

In Upper Klamath Lake, recruitment of the Lost River and shortnose suckers to adult size classes has become inconsistent, as evidenced by gaps in known year classes of spawning adults. The last known strong year classes are from 1977 and 1978 (Buettner and Scopettone 1990). A juvenile year class from spawning activity in 1991 may represent a future year class (Markle pers. comm.), but because it is not known if most mortalities in any one year class occur in the larval, juvenile, or young adult stages, it is impossible to know if this year class will survive to maturity.

A distinct population of Lost River suckers normally spawns at Sucker Springs from mid-March through mid-

April, but may begin as early as the first of February (Andreasen 1975, Buettner and Scopettone 1990, Klamath Tribe 1991). The entire existing gravel bed where spawning occurs at Sucker Springs is not covered with water until lake surface elevation rises above 4,141.5 feet. However, less than half of the gravel is usable spawning habitat at this level (Klamath Tribe 1991). Reclamation plans to expand the existing gravel bed to allow spawning at lower lake level elevations. Buettner and Scopettone (1990) observed Lost River suckers spawning at Sucker Springs in water depths of 18 centimeters (cm) to 61 cm (0.6 to 2.0 feet). Therefore, a lake level of 4,141.0 feet from March through April would provide access to the gravel suitable for spawning habitat. The substrate type most available to suckers that spawn in the lake is similar to rip-rap type material (Scopettone pers. comm.) which makes eggs vulnerable to predation due to their inability to adequately cover the eggs completely when spawning. A rainbow trout captured at Sucker Springs during sucker spawning was documented to have a stomach full of eggs that were the same size and color of Lost River sucker eggs (Andreasen 1975). Spawning gravel was added to Sucker Springs in 1987 and large numbers of Lost River suckers were observed using the improved area (Buettner pers. comm.). Suckers spawning at Sucker Springs were observed burying their eggs down into the gravel (Scopettone pers. comm.) which would minimize or eliminate predation on the eggs by other fish. The depths that fish were observed spawning at were 18 cm to 61 cm (Buettner and Scopettone 1990). A lake level of approximately 4,142.1 feet was suggested by the Service in the August 14, 1992, biological opinion, as a

lower limit for sucker spawning at Sucker Springs. However, observations at Sucker Springs in 1992 indicate that stability of water levels during the spawning period may be more important than the level itself. It is theorized that increases in lake levels allow colder lake water to displace the warmer spring water the eggs were laid in, thus reducing survival of the eggs (Dunsmoor pers. comm.). Therefore a maximum increase in surface elevation of one foot during the spawning and incubation and minimal increases during the early incubation period is recommended to maintain more suitable habitat. This opinion sets more historic and stable lake elevations for spawning at Sucker Springs.

There was also a population of Lost River suckers that historically spawned at Barkley Springs, which was incorporated into Klamath County's Hagelstein Park in the early 1960's. Access to the spring and its spawning gravels is now currently blocked by a dam that forms a pond, although suckers attempted to spawn in the area as recently as 1973 (USBR 1992). Spawning access could be re-established by modifying the outflow of the pool.

Shortnose sucker spawning activity was observed at Ouxy Spring in Upper Klamath Lake on April 30, 1992 (Dunsmoor pers. comm.). The lake surface elevation at the time was reported by Reclamation to be 4141.68 feet. It is not known if this population is restricted to spawning in this spring area.

Most of the Lost River and shortnose suckers that spawn in the tributaries of the lake do so in the Williamson River and Sprague River downstream from the Chiloquin Dam, although the presence of larvae and juvenile Lost River

suckers in the Wood River and Crooked Creek may indicate the presence of an unstudied spawning run (Logan per. comm.). Historically, suckers also spawned in Seven Mile Creek, Four Mile Creek, Odessa Creek, and Crystal Creek and some suckers may still these streams, but their status is unknown. Few of either sucker species have been observed passing the fish ladder at Chiloquin Dam (Bienz and Ziller 1987; Buettner and Scoppettone 1990). Potential spawning habitat exists in 50 km of the Sprague River; of which 48 km is upstream from the Chiloquin Dam (Buettner and Scoppettone 1990). The shortnose sucker is also thought to have used the river upstream from the dam, but documentation of the extent is lacking (Buettner and Scoppettone 1990; Dunsmoor, pers. comm.). Current stream habitat conditions in both the upper Williamson and Sprague River drainages may preclude successful spawning, if access were established, but spawning habitat could be improved. Removal or alteration of the dam to allow fish passage would enlarge the potential spawning habitat by at least a factor of fifty, which may be more efficient and cost-effective than any hatchery program (Scoppettone and Vinyard 1991). The amount of current spawning habitat available may not be limiting the sucker populations, but the concentrations of spawning suckers in relatively small areas of suitable habitat may increase the likelihood of hybridization between species (Scoppettone per. comm.).

For steam spawning populations, shortnose and Lost River suckers begin their spawning migration into the Williamson and Sprague Rivers in late March or early April, with spawning activity often continuing well into May (Andreasen 1975, Buettner and Scoppettone 1990).

Larval sucker migration from the spawning sites on the Sprague and Williamson Rivers can begin in May or June. Bienz and Ziller (1987) reported that larval sucker emigration surveys were initiated in May of both 1983 and 1984, but no suckers were sampled until mid June of both years. Buettner and Scopettone (1990) found that over 90 percent of Lost River sucker juveniles emigrated back to Upper Klamath Lake between 5 May and 15 June in both 1987 and 1988. They found that the majority of shortnose sucker juveniles emigrated within a six-week period after 1 May and 7 May in 1987 and 1988, respectively. It appears that most larval emigration for both species occurs between the hours of 2000 and 0700 (Coleman and McGie 1988; Buettner and Scopettone 1990). During the day, the larvae typically move to shallow shoreline areas in the river (Dunsmoor pers. comm.). The channelization of the lower Williamson River may have negatively affected sucker survival by reducing larval rearing and refuge habitat (Dunsmoor, pers. comm.). Higher densities of larval suckers seem to occur in "pockets of open water surrounded by emergent vegetation" and possibly use the leeward side of this vegetation as a refugium from wave action (Klamath Tribe 1991). Larval and juvenile suckers were found by Buettner and Scopettone (1990) to occur in greatest frequency at 41-50 cm depth (1.35-1.64 feet). Along the lower margins of the Williamson, Buettner found that 35 percent of the larvae were found at sites with emergent vegetation. After emigrating from the parental spawning sites in late spring, larval and juvenile Lost River and shortnose suckers inhabit near shore waters, primarily under 50 cm (19.7 inches) in depth, throughout the summer months

(Buettner and Scopettone 1990). Juvenile suckers were found along gentle slopes and were bottom oriented over sand and mud, both in areas devoid of cover and next to macrophytes (Buettner and Scopettone 1990). In surveys conducted by Oregon State University between July 18 and October 17 of 1991, juvenile suckers were found distributed in near shore areas throughout the lake in beach seine, and case net surveys during the summer. Trawling collected suckers in more open water habitat in October (Markle 1992). The importance of vegetative cover is unknown and sampling in these areas is difficult and limited, but larval and juvenile suckers are known to use these areas and studies to determine habitat preference and survival rates for larval and juvenile suckers are being conducted by Reclamation. Little is known about the life history traits of the Lost River and shortnose suckers during the winter months.

Entrainment of larval suckers has been documented at the A Canal headworks (Markle 1992). In 1991, entrainment estimates peaked twice, once in early June (at 43,887 suckers per day) and once in early July (at 21,773 suckers per day). All but one of the suckers collected during the June peak were identified as Lost River suckers (Markle per. comm.). The suckers collected during the July peak were shortnose and Klamath largescale suckers and preliminary identifications indicate that most of these fish are shortnose suckers (Markle per. comm.). The cumulative estimate for the period between May 13 and July 15 was 759,150 larval suckers entrained. The cumulative estimate was extrapolated from a total catch of 51 larval suckers and 35 of the 51 suckers have been identified as Lost River suckers (Markle 1992). The 3,236 suckers of

undetermined species salvaged out of the Project canals in October-December of 1991, provides further evidence of entrainment.

Upper Klamath Lake was historically eutrophic, but has become hypereutrophic. It has been hypothesized that the hypereutrophic condition of the lake is a result of 20th century marsh drainage and agricultural practices within its watershed (Miller and Tash 1967, Vincent 1968). More than 30,000 acres of marsh around Upper Klamath Lake have been lost this century. Other proposed reasons include changes in the timing and rate of lake flushing due to both dam regulation and changes in inflow, decreases in lake level due to dam regulation and irrigation releases causing the lake to be warmer and more conducive for algal production, and to increased nutrient concentrations due to decreased lake volume. Project actions are not responsible for all of these changes, but would be a contributing factor in most of the proposed reasons for the hypereutrophic condition of Upper Klamath Lake.

Project actions have changed the timing and magnitude of lake level fluctuations. The historic hydrograph for Upper Klamath Lake was flatter, peaked earlier (March/April) than it does under current water management practices (USBR unpubl. data), and had an "average natural fluctuation of the water surface of 2 feet" (Boyle 1976). The pre-project maximum fluctuation was only 2.3 feet, albeit for a short period of record. Annual project induced fluctuations average about three feet, although fluctuations can exceed 5 feet.

Lake nutrient inputs and cycling have been altered, and it has been hypothesized that, as a result, the algal community has shifted to more of a monoculture of the blue-green alga *Aphanizomenon flos-aquae* which is more efficient than green algae at utilizing low concentrations of carbon dioxide. The massive blooms of algae that occur during the summer and autumn months are known to cause extremely high pH, wide fluctuations of dissolved oxygen and carbon dioxide levels, a green appearance and foul odors as the algae decay, and possibly an algal toxicity problem. Fish kills in 1971 and 1986 are thought to have been caused by water quality problems associated with the algae, such as dissolved oxygen depletion due to high water temperatures, and extensive algal decay.

The role of internal nutrient loading is uncertain. Studies by Sanville et al. (1974) showed concentrations of nitrogen and phosphorus in the interstitial water of Howard Bay sediment were several times higher than those near Buck Island and the lake outlet and was believed to be the result of agricultural drainage from nearby ranches. A sediment core taken near the outlet of the lake indicated an accelerated rate of sedimentation in more recent years, possibly related to changes in the watershed and productivity of the lake (Sanville et al. 1974). Miller and Tash (1967) stated "the quantity of nitrogen and phosphorus in only the upper one inch of lake sediments is as great as that quantity which would flow into the lake during the next 60 years if the present rate of inflow continues." However, the availability of sediment nutrients is unknown. Available nutrients may not be unlimited in Upper Klamath Lake, as dissolved inorganic nitrogen usually is depleted below the detection level when algal

production is high, suggesting that nitrogen is the limiting nutrient for algal production (U.S. Army Corps of Engineers 1982).

The maximum pH tolerance found for juvenile shortnose suckers is 9.55 (Falter and Cech 1991), and the minimum critical dissolved oxygen concentration is 0.7 mg/l (Castleberry and Cech 1990). In 1988, few sites with pH values of 9.0 or higher and only sites with dissolved oxygen concentrations between 4.5 and 12.9 mg/l had juvenile suckers (Buettner and Scopettone 1990). Water quality in Upper Klamath Lake during these summer and fall months can quickly degrade to pH values in excess of 10.0 and dissolved oxygen concentrations as low as 0.3 mg/l (Scopettone 1986, Bienz and Ziller 1987, Kann pers. comm.). During the summer and early fall months, pH levels have been above 9.5 in most of Upper Klamath Lake on several occasions in recent years (Kann pers. comm.) and in June of 1992, pH levels as high as 10.5 were measured in the water leaving the lake through the A-Canal (Schwarzbach pers. comm.). When the algae crashes the pH declines, but dissolved oxygen levels usually fall to very low levels (Kann pers. comm.). The lake seldom undergoes full stratification in the summer months when water temperatures average 21° C (Bond et al. 1968) and surface water temperatures can reach 30° C (Coleman et al. 1988, Kann pers. comm.). The high water temperatures and the nutrient cycling resulting from lack of stratification are favorable for blue-green algae growth.

Only areas of the lake near inflows from streams or springs maintain relatively low densities of algae and consistently provide the water quality needed to support

the suckers through stressful periods (Kann pers. comm.). Refugial areas of relatively good water quality are important for fish in Upper Klamath Lake during the summer and early fall when dissolved oxygen and pH levels can be stressful or lethal in much of the lake (Coleman et al. 1988). Lost river and shortnose suckers were captured near Pelican Bay, the Wood River, and the Williamson River during summer months of 1986 when water quality was limiting in most of Upper Klamath Lake (Bienz and Ziller 1987). Golden (1969) reported large runs of suckers in the Sprague River during August of 1966 and 1967 which may have been caused by poor water quality in the lake.

The declining condition of Klamath Basin sucker species has been recognized since at least the mid-1960's (Andreasen 1975). Significant losses to the gene pool of the Lost River sucker may in fact have already occurred with the disappearance of entire stocks (e.g., Harriman Springs, Barkley Springs) between the 1960's and the present (Bond pers. comm.). Overharvest may have contributed to the decline. A decline in the average size of suckers harvested in the snag fishery from 1966-1974 indicates that the fishery may have impacted the population. A fish kill in 1971 may also have contributed to the decline in average size. Exploitation estimates in 1984 and 1985 indicated less than a six percent angler exploitation rate for Lost River Suckers, which were the most exploited species due to their larger size (Bienz and Ziller 1987).

Both Lost River and shortnose suckers are long-lived, highly fecund, and well adapted to surviving drought conditions. Infrequent gaps in recruitment will not

adversely affect healthy populations of sucker species with this life strategy (Scoppettone pers. comm.). Because of the inconsistent recruitment, poor age structure of the endangered sucker populations, and low abundance of shortnose suckers and lake spawning populations in Upper Klamath Lake, this biological opinion does not allow for any more than two consecutive years of deviation (for low water years) from the lake levels that would be more conducive for successful recruitment. In low water years a minimum surface elevation of 4137.0 feet through September 30th has been set to provide sufficient access to and volumes of water in refugial areas during the summer months. In normal water years, a lake elevation of 4139.0 feet should provide suitable habitat for the maintenance and enhancement of sucker populations and will improve the chances of reaching the spring spawning water level. Terms of this biological opinion could be renegotiated if more stable age structures and stronger year-classes developed for both endangered sucker species in Upper Klamath Lake.

Recently comparisons have been made between sucker habitat needs at Upper Klamath Lake and Clear Lake. Habitat needs such as depth and access to vegetation in Upper Klamath Lake have been questioned because Clear Lake appears to have relatively stable sucker populations, has virtually no aquatic vegetation, and exhibits wider fluctuations in lake elevations during most years. Aside from the obvious problems of comparing two very different lakes, the main reason that these habitats needs cannot be compared between the lakes is water quality. Clear Lake is very turbid but has good water quality (dissolved oxygen, pH, and other measurement levels are good

throughout the year) and does not have a high nutrient loading problem. Upper Klamath Lake water is relatively clear, except for high densities of algal, but has poor water quality during the summer and fall, apparently due to the high nutrient loads and seasonal algal blooms. When algal production is high, the pH and dissolved oxygen levels can reach lethal levels for fish in much of Upper Klamath Lake (Kann per. comm.). If Upper Klamath Lake had the turbidity of Clear Lake, it would not have high algal production because the limited light penetration would reduce algal and submergent aquatic plant growth. The reduction in algae production should reduce the water quality problems associated with it. The high turbidity would also provide cover and suckers would readily use shallower depths. Suckers may be forced to feed in shallower depths because most of the lakes productivity is usually limited to shallow water in turbid lakes. Both endangered sucker species generally avoid shallow clear water and use deeper water for cover (Scoppettone per. comm.). For example, suckers spawning at Sucker Springs generally move into the shallow water only at night and retreat to deeper water off-shore during the day (Buettner per. comm.). For all of the above reasons, the two lakes can not be compared because the sucker habitat needs are different in the two lake systems.

There has been much concern expressed in the literature over the possible hybridization of the Lost River and shortnose suckers with other sucker species of the area as well as between the two endangered species. However, recent genetic research at the University of California, at Davis and Oregon State University has indicated that "hybridization has not occurred at an appreciable rate"

(Moyle and Berg 1991). The various State and Federal fisheries agencies are presently operating under the assumption that the species are not hybrids (Scoppettone pers. comm.). However, Harris (pers. comm. 1991) points out that "The question of the source of the morphological variation in shortnose sucker populations remains. Analysis of changes in the DNA sequences over time may provide additional insights into questions concerning the taxonomic status of shortnose suckers and the possibility of hybridization and introgression with Lost River and Klamath largescale suckers."

Clear Lake and Gerber Reservoir Populations

Clear Lake and Gerber Reservoirs, and their tributaries, are part of the Lost River system, all of which are within the current or historic range of the endangered suckers. Clear Lake Reservoir has been reported as being the only area where the Lost River sucker and the shortnose sucker occur together in the Lost River system (Koch et al. 1975), but both species are now known to exist in Tule Lake also. The Lost River and shortnose suckers in Clear Lake are the last known sizeable populations in the Lost River system although in 1992 good numbers of shortnose suckers were reported in Gerber and Harpold Reservoirs and numbers of both species are unknown in Tule Lake. Both endangered sucker species likely suffer from competition with the large number of non-native species that have been introduced to Clear Lake.

In the Clear Lake drainage, both Willow Creek and Boles Creek provide habitat for Lost River and shortnose suckers (Buettner and Scoppettone 1991). Both of these

creeks flow primarily through the Modoc National Forest. Willow Creek is also the primary spawning stream for population in Clear Lake, and juvenile suckers have been observed stranded in pools along the stream (Buettner pers. comm.).

A minimum lake elevation of 4524.0 feet during the spawning season has been suggested by the Service in the January 6, 1992 biological opinion and this biological opinion for spawning access to and larval emigration from Willow Creek. A minimum surface elevation of 4523.0 feet is suggested in this opinion for the remainder of each year to provide adequate depths in the east lobe of Clear Lake for foraging and rearing habitat and to reduce risks of desiccation. Total desiccation of the east lobe is nearly certain in 1992 and it's possible that the west lobe could dry up in 1993 if the current drought conditions continue. A minimum surface elevation of 4521.0 feet for the west lobe is suggested to maintain the populations of suckers during extended droughts. A dike was required in the May 1, 1992 biological opinion to be placed between the two lobes to maintain the 4521.0 elevation in the west lobe.

Because of the relatively consistent recruitment, and diverse age structure of the endangered sucker populations in Clear Lake, longer gaps in recruitment can occur at Clear Lake than at Upper Klamath Lake without harm to the present populations. Good water quality allows more consistent recruitment of year classes when Willow Creek flows allow spawning. This biological opinion allows for up to four consecutive years of deviation from the lake levels (for low water years) that would be most conducive for successful recruitment. Clear Lake does not have

the water quality problems that Upper Klamath Lake exhibits, but has less reliable inflows. Extended periods of low lake elevations are more likely in Clear Lake than Upper Klamath Lake. Four years of compromised lake levels would allow both juvenile and adult shortnose suckers and Lost River Suckers to remain in the population and avoid risks to the entire populations if one life stage was threatened.

Little is known about the endangered sucker population inhabiting Gerber Reservoir. In May of 1992, over 200 shortnose suckers, but no Lost River suckers, were collected from Gerber Reservoir. They ranged in size from 78 to 461 mm FL. The presence of smaller suckers indicates that the population of shortnose suckers in Gerber reservoir has successfully recruited in the last few years (Buettner, pers. comm.). Juvenile suckers (less than 100 mm) were observed in Barnes Valley Creek in 1992, indicating successful reproduction in the creek in 1991 (Buettner, pers. comm.).

Gerber reservoir has been drawn down to critically low levels for irrigation releases in the last two years. It is predicted to reach an elevation of only 4796.9 feet (226 surface acres, 937 acre-feet) in October of 1992, which is less than 1% of the reservoir's capacity. Although the reservoir should maintain adequate depth (17 feet) to maintain a population of suckers, and there has been successful reproduction in the last few low water years, the shortnose suckers sampled in April of 1992 showed signs of stress such as low body weight, poor gonadal development, and reduced growth rates of juveniles, which were probably related to low reservoir levels (Buettner pers. comm.). There have been no minimum

surface elevations for Gerber Reservoir set in any previous biological opinions since evidence of endangered suckers being in the impoundment was only recently confirmed (Buettner pers. comm.). This biological opinion requires no water releases below 4799.6 feet (as recommended by Reclamation) to maintain the sucker population through the summer and winter periods. Lost River suckers have not been caught in Gerber Reservoir and may not exist in this impoundment. The BLM operations in the watershed can affect inflow to the reservoir. Reclamation and BLM have an agreement on operations at Round Valley Reservoir that can reduce inflow into Gerber Reservoir, but during drought years when Gerber Reservoir is below 45,000 acre feet, only 600 acre feet of inflow can be held in Round Valley Reservoir. In severe droughts like the present one, Round Valley Reservoir is nearly dry and cannot release water to Gerber Reservoir.

The Lost River and Tule Lake

Because of present water management practices, the Lost River receives no water from Clear Lake during the winter months. In the months of April (Koch and Contreras 1973) and September (Koch et al. 1975), researchers have observed large numbers of fishes, including endangered suckers, stranded in an isolated pool downstream of the Clear Lake Dam. Koch and Contreras (1973) reported three areas from which they captured suckers in their survey of the Lost River, including Harpold Reservoir, the Lost River below River Bridge on the east side of the city of Bonanza, and the Lost River one mile downstream from Crystal Springs Dam. At least three shortnose

suckers have been recorded in Malone Reservoir (Buettner pers. comm.). Surveys conducted in 1992 indicate good recruitment of shortnose suckers in Harpold Reservoir (Buettner pers. comm.). This reach of the Lost River has apparently been successful in maintaining and supporting this population of shortnose suckers. Maintaining adequate depths and volumes of water in these reservoirs may be critical for the survival of suckers in the Lost River during low flow and freezing conditions.

Populations of Lost River suckers and shortnose suckers in Sheepy Lake, Lower Klamath Lake, and Tule Lake, which constitute the downstream terminuses of the Lost River system (Sheepy and Lower Klamath Lake are now connected to the Lost River via the Tule Lake Tunnel), were believed to be extirpated after 1924, when these lakes were drained for farming (Moyle 1976). However, Lost River and shortnose suckers were observed spawning downstream of Anderson-Rose Dam on May 23, 1991. These fishes may have migrated upstream from Tule Lake, where both species have since been found.

Prior to the 1920's, Tule Lake was reduced from an historical 96,000 surface acres of open lake and marsh to only 13,000 acres of water available to the suckers. Tule Lake is now entirely within a National Wildlife Refuge. The lake is hypereutrophic and water quality is marginal for suckers during the summer months. In June and July of 1992, the pH in most of Tule Lake has frequently been above 9.5 (Reclamation unpublished data). Most of the inflow during these months is irrigation return water that has been reused up to 6 times and is of poor quality for fish with high pH and low dissolved oxygen levels (USGS 1991). Dissolved oxygen levels as low as 0.41 mg/l, and

total ammonia levels as high as 0.88 mg/l have been measured in the Lost River going into Tule Lake in June of this year. In situ survival of fathead minnow fry has been very low with no more than two of 20 surviving during any of four separate tests at the same site in the Lost River during June of 1992 (Schwarzbach per. comm.). The shallow depth, warm water temperatures, and hyper-eutrophic condition of the lake promotes algal blooms and limits the amount of water in the lake with acceptable water quality for suckers and most other fish.

During the winter, Tule Lake is drawn down to an elevation of 4033.5 for flood control. Because of the shallow depths at this elevation, only isolated pockets of water with depths greater than three feet exist during the winter. In severe winters with thick ice cover, this shortage of deeper water could limit the number of fish that survive in Tule Lake and increase the risks of winter kills. Winter kills have not been observed in the lake, but low surface elevations in winter could limit sucker abundance. Waterfowl activity keeps some open water in Tule Lake during the winter and may reduce the risk of winter kills. There may be factors other than water quality and depth limiting sucker populations in the lake.

The Tule Lake Irrigation District diverts water from Tule lake and the Lost River for irrigation. Water is also taken from Tule Lake to Lower Klamath Lake via Pump D and the Tule Lake Tunnel. For fish to get to the Klamath River via the Klamath Straits Drain, they would have to pass through at least two additional pumps. These diversions may have a negative impact on the suckers (especially larval suckers) by direct mortality through the pumps, or

mortalities through desiccation, aquatic vegetation control, predation, and poor water quality associated with the canal systems (see the *Incidental Take* section dealing with incidental take in canals). Suckers that do survive these diversions are still lost to the Tule Lake population and probably trapped in systems where they cannot complete their life cycle.

The Upper Klamath River

The shortnose sucker population in Copco Reservoir appears to consist of mostly adults over the age of 16 years (Scoppettone and Vinyard 1991; Maria pers. comm.). Shortnose suckers sampled from the reservoir typically are between 16 and 18 inches in fork length (Beak 1987; Maria pers. comm.). The only small "adult" shortnose suckers sampled from the reservoir were reported by the CDFG (1974), which included four suckers between 7.5 to 8.5 inches in fork length.

Shortnose sucker's congregate in the upper portion of the reservoir in early April prior to beginning their spawning run up the Klamath River (Beak 1987). Most of the shortnose sucker spawning occurs within two miles upstream of the reservoir (Beak 1987). More detailed information about the spawning run and larval migration is given in the biological assessment (USBR 1992)

Recent information obtained from the ODFW (ODFW) (Fortune pers. comm.) indicates that both shortnose and Lost River suckers have been captured in J.C. Boyle Reservoir within the last decade. In addition, ODFW research efforts monitoring instream passage of suckers over Keno and Link River Dams have documented the following:

At Link River Dam in 1989, four Lost River suckers (525-585 mm) and three shortnose suckers (410-465 mm) were observed.

Observations at Keno Dam included four Lost River suckers (480-491 mm) in 1988, four Lost River suckers (520-610 mm) in 1989, three shortnose suckers (221-424 mm) in 1990, and one shortnose sucker (390 mm) in 1991.

Sheepy Lake may support Lost River and shortnose suckers and is connected to the Klamath River via the Klamath Straits Drain and the Ady Canal. Suckers of unknown species were observed in Sheepy Lake in 1988. Suckers from the Klamath River could enter Sheepy Lake from the Ady Canal. It is unknown if Sheepy Lake could maintain a resident population, but it is known to support other fish. Sheepy Creek historically supported large spawning runs, but the creek runs through private property and current water diversions from the creek may preclude successful spawning.

Effects of the Action

The species addressed in this section include the bald eagle and the Lost River and shortnose suckers. The discussion is combined for the sucker species because past and continuing changes in their habitat have had a similar impact on both species.

Bald Eagle

The most important effects of the proposed management regimes on bald eagles will be indirect. These effects are expected to result from changes in prey availability

related to water management strategies. Generally, wet year and average year operations are not expected to result in adverse effects. Effects of single dry years will probably be minimal, but consecutive years of dry year operations may adversely affect breeding territories of the species at Gerber Reservoir and winter foraging habitat throughout the Basin.

Gerber Reservoir

Observations of the interactions between reservoir management and bald eagle reproduction in northern California (USFWS 1992) suggest a pattern that may be repeated at Gerber Reservoir. Reservoir drawdowns during dry year operations may result in temporary increases in forage availability if reduced habitat causes increased concentration of fish populations and higher fish mortality rates. If more drought years follow, lake levels will remain very low and fish populations will continue to decline or stabilize at a lower level. If precipitation increases, the lakes will begin to rise, dispersing the remaining fish population into increasing habitat. It may take one or more spawning years for fish populations to respond to increasing habitat as reservoirs rise. In either case, forage availability is expected to be lower for some time following periods of unusual drawdowns, and this may in turn result in lower reproductive rates among the resident bald eagles.

During the past few drought years, the combination of low inflows and drawdowns associated with irrigation deliveries have resulted in low water levels at Gerber Reservoir. Reservoir storage has not exceeded 70 percent

of capacity since that time, and has dropped to below 10 percent of capacity each year. The resulting reduction in fish habitat is suspected to have reduced fish populations in the reservoir and otherwise reduced forage availability, with resultant effects on eagle reproduction.

Table 1. shows the reproductive history of the two pairs of bald eagles occupying the reservoir. The rate of reproductive failures has been noticeably higher during the period of low reservoir levels. In the five years up to and including 1987, the eagle reproductive rate was 1.14 young per occupied site per year with one failure in seven attempts, while in the years following 1987, the overall reproductive rate was 0.75 young per occupied site per year with four failures in eight attempts. The latter reproductive mean is considerably below the rate of 1.0 young per occupied site per year recommended by the Pacific Bald Eagle Recovery Plan (USFWS 1986).

Successful eagle reproduction at Gerber Reservoir may be influenced by competition for a shrinking forage resource. The second territory at Gerber was established in 1986; both pairs bred successfully in the two years prior to the change in management regime. Since the change, only one pair has been successful in any year.

Information on 1992 reproduction is not yet complete and was not included in the above calculations, but at the date of this opinion, one territory already is known to have failed (Hicks pers. comm.). As required by the 1991 biological opinion (USFWS 1991), a monitoring program was established in 1992, and a supplemental feeding program is being planned in the event it becomes necessary.

Table 1. Reproduction at Gerber Reservoir bald eagle territories (Data from Isaacs and Anthony 1990, and U.S. Bureau of Land Management)

Year	Barnes Valley terr.	North terr.
1983	1	—
1984	2	—
1985	0	—
1986	2	1
1987	1	1
1988	0	2
1989	2	0
1990	0	1
1991	0	1

As discussed above, a number of factors may affect eagle reproduction. The actual cause of the low recent reproductive rate is unknown, and low sample sizes preclude statistical analysis of these data. However, strong circumstantial evidence suggests that reservoir management and resulting lack of forage may have negatively affected bald eagle reproductive rates at Gerber Reservoir in recent years. These observations suggest that during future operations, consecutive years of dry year management regimes may have similar results.

Upper Klamath Lake

None of the proposed actions are expected to adversely affect bald eagles at Upper Klamath Lake, because effects on prey populations are not anticipated to be substantial. Eagle reproduction at Upper Klamath has been within the normal range during the past few years (Isaacs pers. comm.). Because the primary forage species at Upper

Klamath (tui chubs and blue chubs) are spring spawners, they should not be significantly affected by summer and autumn drawdowns.

Klamath Basin Wildlife Refuges and Agricultural Lands

One pair of bald eagles that breed at Mt. Dome are believed to forage primarily on Lower Klamath NWR. Reproduction by this pair has been satisfactory throughout the recent dry years. Effects on this pair would not be expected except under the most extreme conditions.

Reduced water deliveries to the National Wildlife Refuges and agricultural lands during dry year operations may affect the quantity and quality of habitat for migratory waterfowl and the availability of small mammals during winter flooding. Some indirect effects on wintering eagles may be anticipated; however, the magnitude of such effects cannot be predicted with existing information. Food stress caused by lower prey populations may force portions of the wintering eagle population to migrate elsewhere. In the worst case, an unknown number of eagles may starve and an unknown number of adult eagles may suffer from lowered condition at the beginning of the breeding season.

Clear Lake

No bald eagle breeding territories are located at Clear Lake. One pair of eagles that breed five miles to the east at Willow Creek may forage at the lake on occasion; this tendency may be reinforced by a general lack of water in their breeding area during dry years (Studinski pers.

comm.). Reproductive data available to the Service is incomplete. Reduction of fish populations in Clear Lake due to dry year operations may adversely affect this pair.

Summary of Effects on the Bald Eagle

In summary, the proposed project may adversely affect bald eagles by altering the forage base for four nesting pairs and their young, and for numerous migratory eagles. This effect may be manifested by any of the following behaviors: failure to lay eggs, failure to complete incubation, starvation of nestlings or fledglings, abandonment of nest territories by adults, or lowered condition among migrants.

Lost River and Shortnose Suckers

Project irrigation will decrease inflows into the lakes and rivers and increase nutrient loading from return flows, which has contributed to the hypereutrophic condition of most of the water in the Upper Klamath Basin (USGS 1991). With the proposed action, Reservoirs and rivers in the Project may be reduced to dangerously low levels during drought conditions. Further reductions in available habitat is unlikely as Reclamation does not anticipate any significant expansion or reductions of the project water demands in the future.

The effects of the Project are not limited to the project area, as decreased flows in the Klamath River and poor water quality from irrigation return water (via the Klamath Straits Drain) could negatively impact downstream water users and aquatic life. Dissolved oxygen

levels as low as 0.0 mg/l, temperatures up to 28.5°C, and pH levels as high as 9.4 were measured in the Klamath Straits Drain in 1991 (Reclamation unpublished data, Schwarzbach pers. comm.). Total ammonia levels as high as 0.94 mg/l have been measured in the Klamath Straits Drain and survival of fathead minnow fry was 0/20 in two of four days of testing at two different sites in the drain during June of 1992 (Schwarzbach per. comm.). Downstream populations of endangered suckers and other listed species could be affected by future Klamath Project actions and/or other cumulative effects.

Looking forward in time, given the current status and trends of the endangered suckers and present state of habitat degradation and impacts to listed species resulting from interrelated activities, the outlook is not optimistic. Long-term survival depends on survival through the next few years. The project is currently in the worst drought year on record and reservoirs are receiving record low inflows. Formally stable populations, such as those in Clear Lake, are now threatened by drought related stresses. Without proposed improvements in water quality and sucker habitat, the future of these suckers is imperiled and the present status of habitat condition makes extinction in most of their current range highly likely.

However, the mitigation measures and reasonable and prudent alternatives described in this Biological Opinion are expected to greatly reduce the risk of extinction, and Reclamation's conservation efforts will be a vital part of the recovery and ultimate downlisting of these species.

Clear Lake Reservoir Endangered Sucker Populations

Implementation of the proposed water releases under Clear Lake drought operations coupled with expected lake level declines from seepage and evaporation will result in several direct adverse effects to Lost River and shortnose suckers. Effects of the 1992 proposed action are addressed in the biological opinion issued May 1, 1992 and are hereby incorporated by reference.

During drought years, irrigation releases, evaporation and seepage will result in a loss of reservoir surface area and hence, a loss of Lost River and shortnose sucker habitat. For example, Reclamation projects that, with irrigation releases, the water surface elevation of Clear Lake Reservoir will drop to 4,518.0 feet (8,500 surface acres) by October 1, 1992. This elevation represents only about 50 percent of the surface area at elevation 4524 feet (17,100 surface acres), which was the minimum surface elevation required in the January 6, 1992 biological opinion. Surface elevations lower than 4524 feet in the months of February and March could reduce access to Willow Creek for spawning. A decrease in water surface elevation will also increase the susceptibility of fishes to predation by pelicans, bald eagles, and other fish-eating birds. The resulting loss of water volume could in turn, result in increased water temperatures throughout the lake and decreased dissolved oxygen concentrations.

The projected water surface elevation of Clear Lake at the end of the irrigation season in drought years potentially may result in winter kill of Lost River and shortnose suckers. Clear Lake freezes in the winter (Studinski pers. comm., Hainline pers. comm.) and concentration of fishes

in a small volume of water under a frozen surface may result in the depletion of dissolved oxygen concentrations and subsequent fish kills. For example, the surface of small reservoirs southeast of Clear Lake are known to develop ice layers as thick as 16 to 18 inches deep (Studinski pers. comm.). However, Clear Lake is a much larger body of water and may react differently during freezing periods.

With an extended drought, Clear Lake has the potential to become completely desiccated or reach elevations incapable of sustaining sucker populations due to factors given in the paragraphs above. This is partially due to natural causes, but the potential has been greatly increased by irrigation releases during the last several drought years.

Gerber Reservoir

Gerber reservoir has been drawn down to critically low levels for irrigation releases in the last two years. Extended periods of low water levels will reduce the sucker populations to carrying capacities at these lower levels and possibly reduce access to streams for spawning. Reservoir elevations sufficient to support fish populations through the critical summer and winter periods have been voluntarily maintained by the Langell Valley Irrigation District and Reclamation in 1991 and 1992, but the threat of longer periods of low water levels and reductions in the shortnose sucker population potentially exists for future years.

Tule Lake

The shallow depth, hypereutrophic condition of the lake, and algal blooms will continue to limit the amount of water in the lake with acceptable water quality for suckers and most other fish with the proposed action. During the winter, only isolated pockets of water with depths greater than three feet exist and in severe winters with thick ice cover, this shortage of deeper water could limit the number of fish that could survive in Tule Lake and increase the risks of winter kills. The proposed action would provide only inconsistent spawning flows in the Lost River.

Water is diverted from the lake and the Lost River for irrigation and also taken from Tule Lake to Lower Klamath Lake via Pumping Plant D and the Tule Lake Tunnel. These diversions may have a negative impact on the suckers (especially larval suckers) by direct mortality through the pumps, or mortalities through desiccation, aquatic vegetation control, predation, and poor water quality associated with the canal systems (see the *Incidental Take* section dealing with incidental take in canals). Suckers that do survive these diversions are still lost to the Tule Lake population and may be trapped in systems where they cannot complete their life cycle. The proposed action is basically no change and therefore current problems are likely to continue.

Upper Klamath Lake and Agency Lake

Upper Klamath Lake and Agency Lake will be considered as one and referred to as Upper Klamath Lake unless stated otherwise.

Implementation of planned water releases likely will directly affect Lost River and shortnose suckers by reducing the extent and quality of spawning, rearing, and refugial habitat in low water years. Reduced late summer and fall water quality conditions existing in Upper Klamath Lake can make much of the lake uninhabitable for Lost River and shortnose suckers (Coleman et al., 1988, Kann pers. comm.). Nutrient and organic matter becomes more concentrated and potential for warmer water temperatures increase as a result of the reduction in lake volume and could promote algal growth. When algal production is high, dissolved inorganic nitrogen usually is depleted below the detection limit, suggesting that nitrogen is the limiting nutrient for algal production (U.S. Army Corps of Engineers 1982). Algal blooms usually occur as water temperatures increase, resulting in high pHs and further declines in dissolved oxygen concentrations. Lower lake elevations would increase the potential for more extremes in lake water temperatures as the lake water volume and depth is reduced. The mean critical thermal maxima for shortnose suckers acclimated to 20°C (68.0° F) is 32.7° C (90.9° F) (Castleberry and Cech 1990). Metabolism in ectotherms, such as fish and invertebrates, is directly correlated with temperature. As temperature increases so does metabolism. Therefore, regardless of whether Lost River or shortnose suckers experience water temperatures that approach their thermal tolerance, they, and the other biota inhabiting the lake, would be increasingly stressed as water temperatures increase and dissolved oxygen capacities concurrently decrease. The increased metabolic respiration

would further reduce the dissolved oxygen level. In addition as lake levels decline, the net supply of dissolved oxygen would proportionally decline and may become too low to support the population of native and introduced fishes inhabiting the lake.

Spawning habitat and access for lake spawning suckers should improve with proposed actions at Barkley Springs and other springs, but this may not mean improved recruitment because most of the mortality may occur beyond the larval life stage. Spring and early summer water elevations may be more consistent and beneficial for sucker spawning purposes due to minimum Upper Klamath Lake elevations required in biological opinions, but the lack of recruitment may negate any increases in spawning success.

The proposed action will initiate several studies that may provide solutions to the present water quality problems. Proposed research may also provide answers for sucker identification, distribution, habitat requirements, and recruitment problems. However, much of the proposed action does not include plans for implementing the solutions to be identified in these studies, nor are there any significant changes (except possibly in drought years) in proposed operations in Upper Klamath Lake relative to operations of the Project in the last 70 years. Changes are needed to improve water quality or at least increase the amount of lake habitat that can support suckers through periods of stressful water quality. Problems with water quality are likely to continue and sucker populations are likely to decline further if the current watershed management practices are continued. Many of these watershed practices that are reducing water quality and quantity are

above Upper Klamath Lake and cannot be directly changed by Klamath Project actions. Changes in watershed practices and water quality are likely to be slow and a rapid recovery of the endangered suckers in Upper Klamath Lake is unlikely.

Copco Reservoir and Other Klamath River Impoundments

Little is known about the sucker populations in the impoundments downstream of Upper Klamath Lake, but Reclamation has committed to investigating these populations. Shortnose suckers in Copco Reservoir are known to spawn in the Klamath River upstream of the reservoir. Irrigation diversions and drought conditions in the Upper Klamath Basin have reduced flows in recent years to less than ideal levels for spawning above Copco Reservoir (Maria pers. comm.) and impacted water quality negatively in all of these downstream reservoirs.

Cumulative Effects

Cumulative effects are those effects of future non-Federal (State, local governments, or private) activities on endangered and threatened species or critical habitat that are reasonably certain to occur within the action area of the Federal activity subject to consultation. Future Federal actions are subject to the consultation requirements established in section 7 and, therefore, are not considered cumulative to the proposed action.

Private landowners along streams tributary to Upper Klamath Lake annually exercise their State of Oregon

rights to withdraw water for irrigation and livestock watering. The total amount of water that is annually withdrawn before it reaches Upper Klamath Lake has not been calculated but is thought to be substantial (Rodgers pers. comm.). It is estimated that about 186,000 acres benefit from diversions (which are believed to be at least 372,000 acre-feet) above the Klamath Project boundaries. Nutrient enriched return flows from these upstream agricultural lands coupled with the reduced flows because of irrigation depletion likely contribute to the eutrophication in Upper Klamath Lake. The resulting lowered water surface elevation and poor water quality in Upper Klamath Lake likely may affect all three listed species considered in this biological opinion. Continued farming of the 20,000 acres of lands adjacent to Upper Klamath Lake which were converted from marshland could have the effect of degrading water quality and influencing refugial conditions adjacent to the lake by the dredging of shoreline areas and irrigation practices.

Agency Lake Watershed Area

Numerous farms and ranches in the Fort Klamath area divert significant quantities of water out of the various streams and springs in the watershed upstream and adjacent to Agency Lake North of Upper Klamath Lake. The natural streams in this area include: Sevenmile Creek, Fourmile Creek, Annie Creek, the Wood River, and Crooked Creek. Additionally, water from various natural springs is diverted to various maintained ditches which supply irrigators in the area. Major ditches conveying water from the natural creeks and springs to the irrigators include: Bluespring, Sevenmile, and Melhase Ditches.

Return flows from these ditches are collected into several canals which connect with and are adjacent to Agency Lake. These canals contain water year around and include: West, Sevenmile, Central, and North Canals among others.

The Meadows Drainage District and many individual landowners divert water through the aforementioned ditches. A more detailed description of these diversions is given in the biological assessment (USBR 1992).

Juvenile Lost River and shortnose suckers known to occur in the Wood River and Crooked Creek, (Markle pers. comm.). It is suspected that some of these sucker species may be spawning in these tributaries to Agency Lake (Markle pers. comm.). In larval distribution and abundance studies at the confluence of the Wood River and Agency Lake in 1991, investigators collected larval suckers indicating that suckers were using the Wood River drainage for spawning habitat (Markle 1992). Depending on how far these spawning fish migrate upstream in the Wood River and Crooked Creek, the adult spawners, embryos, and emerging larvae of these suckers may be impacted by water diversions from these tributaries. If spawning suckers are in downstream reaches of the Wood River and Crooked Creek below the irrigation diversions when water deliveries to the ditch systems are diverted out of the channel, then the spawning behavior of these fish may be disrupted resulting in no sucker spawning in that year.

In their 1991 sucker larval distribution and abundance investigation, Markle (1992) found that larval suckers were emigrating through the lower Wood River into the

confluence with Agency Lake in late July. This corresponds to the approximate peak of water diversion (June-mid August) from the Wood River and Crooked Creek (Sparks, pers. comm.). Therefore, if suckers succeed in spawning within the reaches downstream of the ditch diversions, the embryonic and emergent lifestages would potentially be subject to diversions into canals and fields, reduced flows and resulting elevated water temperatures during incubation and larval emigration.

In addition to the potential direct impacts on sucker populations of the diversion of water into the irrigation ditches upstream of Agency Lake, potential indirect impacts of these diversions are possible. As was previously noted, a large portion of the water diverted to the irrigation ditches is recovered to the ditches as return flows (Sparks, pers. comm.). Depending on land practices, use of fertilizers, herbicides, and other chemicals, the number of reuses, and erosion in the this agricultural area, the water quality (including dissolved oxygen, turbidity, and temperature) of these return flows could range from fair to extremely poor. The return water upon collection in the downstream canals, could then potentially impact the water quality of the marsh and near-shore habitats of larval, juvenile, and or adult suckers or other fishes present. It is known that young life stages of suckers frequent these and other habitats types in Upper Klamath Lake. Vincent (1968) found that approximately 79 percent of suckers sampled in his study areas were collected in either marsh or rocky shoreline habitat as compared to mid-lake sampling locations. Vincent (1968) determined that of approximately 20 miles of shoreline habitat in Agency Lake, 9.5 miles were marsh shoreline

habitat. Markle (pers. comm.) found that in their sampling, Agency Lake was devoid of larval or young of the year suckers after late summer. The inability to collect larval suckers indicates that the larval suckers sampled at the Wood River confluence earlier in the summer had either: migrated out of Agency Lake, there were so few recruited into the Lake that their abundance was minimal and could not be detected by sampling, or that no larval suckers survived in Agency Lake after mid-summer. Nutrient rich irrigation return water from the irrigation ditches on suckers in Agency Lake could result in blue-green algal blooms and anoxic conditions within Agency Lake itself. These noxious blue-green algal blooms and resulting degraded water quality could potentially result in fish kills in Agency Lake during the late summer months and may explain the lack of larval suckers in Markle's 1991 larval abundance study.

Williamson River Drainage

Recent information indicates that there are unscreened diversions on the lower Williamson River in the area of concentrated Larval migration and rearing. These diversions may be reducing recruitment to Upper Klamath Lake of fish produced in the Williamson and Sprague River systems. Agricultural practices in the drainage could have the same effects as those listed above for the Agency Lake drainage.

Sprague River Drainage

Chiloquin Dam

Chiloquin Dam, located just upstream of the Sprague River's confluence with the Williamson River, is estimated to have eliminated more than 95 percent of the potential spawning habitat for the Lost River sucker and shortnose sucker and is considered one of the reasons contributing to the decline of the suckers (Federal Register, Vol. 52, No. 165: 32145-32149). Although fish passage facilities on the dam have been installed, the dam has served as an almost total barrier to the annual spawning migrations for the endangered suckers (Stern, 1990); only a very small percentage of the upstream migrating suckers successfully pass the dam through the existing fish ladder (Bienz, Klamath Tribe, pers. comm.). More detailed information about Chiloquin Dam is given in the biological assessment (USBR 1992).

Blockage of the suckers at the dam during their upstream spawning migration forces the fish to spawn enmasse in the short river reach immediately downstream of the dam. Concern has been expressed that spawning of multiple species within a relatively confined area may cause hybridization, although this has not yet been confirmed. Lost River and shortnose suckers have been observed spawning together below Chiloquin Dam (Dunsmoor per. comm.). Spawning and rearing habitat in reaches downstream of the dam are very likely limited. In addition, mass spawning of the suckers in a confined area close to Upper Klamath Lake may create adverse density-dependent conditions limiting recruitment of larval suckers

(e.g., competition for limited food supply and rearing habitat in confined areas of the lower Williamson River).

If existing fish passage conditions at Chiloquin Dam persist, it will very likely restrict recovery efforts for the endangered suckers.

Agricultural Uses in the Sprague River Drainage

Spawning habitat in the Sprague has been degraded by channelization, sedimentation, increased water temperatures, high nutrient concentrations, and the resulting growth of periphytic algae and aquatic macrophytes. These problems originate in the Sprague River Valley, upstream of the present-day spawning areas, where agricultural activities have degraded the riparian habitat. In addition to the resulting loss of spawning habitat, the Sprague River is a major contributor of excess nutrients to the hypereutrophic Upper Klamath Lake. Long-term success of spawning habitat restoration efforts in this river system depend almost entirely on rehabilitation of the upstream reach of the Sprague River (USFWS, 1992).

Agricultural Diversions from the Klamath River

Agricultural (irrigation) diversions from the main stem of the Klamath River are known to exist in the river reach upstream of Copco Reservoir #1 and the California-Oregon border (Beak, 1987). These diversions provide water for irrigation to a private landowner through a lease of PP's water rights (D. Maria pers. comm.). While these structures are relatively large, they probably do not impede fish passage in this river reach (Shrier pers.

comm.). More detailed information about these diversions are given in the biological assessment (USBR 1992). The timing, volume, and the pattern of use of these irrigation diversions as well as their impact, (if any) on sucker populations are unknown although impacts due to water quality and entrainment are likely. No other agricultural diversions are known in this vicinity (Maria; Shrier pers. comm.).

Other Sources of Potential Impacts

Water quality on the main stem of the Klamath River upstream of the Keno Regulation Dam can at times be degraded due to treated sewage, storm water and non-point source runoff from urban areas of the City of Klamath Falls (Fortune pers. comm.). Lumber mills along the Klamath River near Klamath Falls could also contribute to water quality problems in the river. The impoundment of the nutrient rich waters in the reservoirs are known to contribute to algal blooms within the reservoirs and cause downstream algal nuisance conditions in the river (The Klamath River Basin Fisheries Task Force, 1991). The nutrient loads in these reservoirs and the river are known to be elevated, with 79 percent of the nitrogen and 68 percent of the phosphorus in the Klamath River coming from sources upstream of the Iron Gate Dam (CDWR, 1986, as cited by The Klamath River Basin Fisheries Task Force, 1991).

Except for natural erosion along the banks of the Klamath River, there appears to be no other major source of sediment input to the Klamath River (Maria pers. comm.). The river reach below the J. C. Boyle Dam in Oregon to

the California border was designated as the Klamath Scenic Waterway in 1988. The subsequent reach below the state line to the Copco Reservoir is designated "Wild Trout Waters" by the CDFG (The Klamath River Basin Fisheries Task Force 1991).

Harpold Dam

This dam, located about three (3) miles below the town of Bonanza on the Lost River, is privately owned and operated and provides a pool for the Horsefly Irrigation District and individual farmers to pump from for the purpose of irrigation. Large numbers of suckers have been observed in this area by Koch (1973), and spawning activity was reported in nearby Bonanza Springs by Reclamation (Buettner pers. comm.). The population was reported as consisting of shortnose suckers that resemble those of Clear Lake. No Lost River Suckers have been observed there in recent sampling (Buettner pers. comm.). Spawning habitat exists both upstream and downstream of the flash board dam. The dam has no fish passage facilities.

Harpold Dam creates lake type habitat through the irrigation season and a pool through the winter that would not exist otherwise and allows a population of shortnose suckers to maintain itself in the Lost River. Under drought conditions this population is threatened by low water levels due to irrigation pumping and efforts to maintain this population should be initiated.

Gerber Reservoir Watershed

There are six private water use developments within the Gerber Reservoir Watershed (USBR 1970). These developments are primarily for stock grazing operations. Approximately 13,300 acres of both privately held and Forest Service permitted land are included in these developments. Each of these operations use a combination of dams, reservoirs, and ditches to distribute water or use dikes, ditches and canals to irrigate their lands. Use of these water rights are primarily for pasture, and hay and grain cultivation.

The effects of the impoundment of this water on the Lost River and shortnose sucker are unknown. The water development operations would be expected to reduce flows into the major tributaries to Gerber during the runoff. If flows in these tributaries were significantly reduced, then spawning habitat would be reduced. Additionally, irrigation return water quality is probably poorer (nutrient enriched, elevated temperatures, lower dissolved oxygen). A reduction in the quality of the return flows to both the tributaries and Gerber Reservoir may reduce the suitability of the sucker and bald eagle habitat at the reservoir.

Other Effects

The transportation of hazardous materials by truck and train along the Upper Klamath Basin could result in spills and negative impacts to the listed and unlisted species in the basin's waters. Algae harvesting in Upper Klamath Lake and various Project canals may also result in the take of larval and juvenile suckers. The use of chemicals

such as pesticides, herbicides, and mosquito or "midge" control chemicals could result in negative impacts to listed species throughout the basin. The diversion of water directly from Upper Klamath Lake by private (non-Project) water users may result in the taking of suckers and reduction of habitat.

The Service is aware of no other future or presently occurring non-federal activities within the Klamath Project service area that would affect the Lost River sucker, shortnose sucker, or bald eagle.

These cumulative effects and/or those of the proposed action are likely to reduce appreciably the likelihood of the survival and recovery of the Lost River sucker and shortnose sucker. However, they are not likely to reduce appreciably the likelihood of the endangered/threatened bald eagle to survive and recover.

Incidental Take (Bald Eagles Only)

Section 9 of the Act, as amended, prohibits any take (harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or attempt to engage in any such conduct) of listed species of fish or wildlife without special exemption. Harm is defined to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing behavioral patterns such as breeding, feeding, or sheltering. Under the terms of Section 7(b)(4) and 7(o)(2), taking that is incidental to and not intended as part of the

agency action is not considered a prohibited taking provided that such taking is in compliance with this incidental take statement. The measures described below are non-discretionary, and must be undertaken by the agency.

The Service anticipates that incidental take attributable to the proposed action may result from three situations associated with lowering reservoir levels:

1. Harassment/Harm of adult bald eagles. The specific effects that the Service anticipates will occur as a result of lowering lake levels that may result in harm and/or harassment, and, therefore, incidental taking of adult bald eagles are as follows:
 - (a) Decreased prey abundance and/or availability.
 - (b) Increased distance between nest locations and foraging areas, and the resulting increased energy demand to procure and transport food to nestlings.
 - (c) Reduced shoreline lengths resulting in diminished foraging habitat and increased interspecific and intraspecific competition.
 - (d) Increased distance from hunting and feeding perches to foraging areas, thus reducing foraging efficiency.
 - (e) Increased concentration among recreational users on smaller surface areas, and resulting restriction of eagle access to foraging areas.
2. Harassment/Harm of nestling bald eagles. The Service anticipates that the adverse effects described in parts 1(a-e) of the above incidental take discussion could reduce the ability of adult bald eagles to properly care for eggs or nestlings, thus resulting in their death or impairment.

3. Harassment/Harm of fledgling, immature, and sub-adult bald eagles. The Service anticipates that the adverse effects described in parts 1(a), (c), (d), and (e) in this incidental take discussion may combine to harm and/or harass non-breeding bald eagles.

The Service anticipated that the maximum annual incidental take attributable to dry year operations to be a total of 8 adults and 24 bald eagle eggs or young at breeding territories at Gerber Reservoir, Mt. Dome, and Willow Creek. In addition, an unquantifiable amount of take may result due to effects on wintering eagles. The following reasonable and prudent measures are necessary and appropriate to minimize the impact of incidental take of bald eagles.

1. Maintain prey base for adult and nestling bald eagles.

In order to be exempt from the prohibitions of Section 9 of the Act, the Reclamation is responsible for compliance with the following terms and conditions, which implement the reasonable and prudent measures described above.

- 1.(a) Following dry year operations, as needed, restore reservoir fish populations by stocking as soon as water levels are sufficient to maintain them. Fish species must include native species known to be utilized by bald eagles. Coordinate fish restocking programs with the Service and the ODFW.
- 1.(b) During dry year operations, implement a monitoring program at Gerber Reservoir and Willow Creek to identify instances where intervention in the form of supplemental feeding of adults or rescue of young may be appropriate; and carry out such actions where

appropriate to minimize take. (Due to the remoteness of the site and the low likelihood of take, no monitoring of the Mt. Dome site is required). Such monitoring programs and actions shall be conducted in full coordination with the Service, the U.S. Forest Service, the bureau of Land Management, the ODFW, and the CDFG.

The incidental take statement included in this opinion satisfies the requirements of the Endangered Species Act, as amended. This statement does not constitute authorization for take of listed migratory birds under the Migratory Bird Treaty Act, the Bald and Golden Eagle Protection Act or any other Federal statute.

Reasonable and Prudent Alternative

Regulations implementing Section 7 define reasonable and prudent alternatives as alternative actions, identified during formal consultation, that: (a) can be implemented in a manner consistent with the intended purpose of the action; (b) can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction; (c) are economically and technically feasible; and (d) would avoid the likelihood of jeopardizing the continued existence of listed species or result in the destruction or adverse modification of critical habitat. A reasonable and prudent alternative with respect to the agency action and the Lost River and shortnose suckers is as follows:

Upper Klamath Lake

1. Reclamation shall maintain water surface elevations in Upper Klamath Lake at not less than 4141.0 feet

and a maximum increase in elevation of one foot from March 1st through April 30th of each year, or until 80 percent of swim-up has occurred, to provide stable spawning habitat and prevent desiccation of deposited eggs at Sucker Springs. The determination of 80 percent swim-up will be made with a Service approved method. The maximum increase in elevation of one foot may be exceeded in any year with the implementation of a Service approved operational plan, and would not count toward the four years of compromise. A minimum surface elevation of 4141.0 feet will be required by May 31st of each year to provide larval and juvenile rearing habitat. Project management generally aims for as high a water level as possible at this time of year, and in most years lake elevations are above 4142.0 feet. A minimum surface elevation of 4139.0 feet must be maintained from June 1st through the end of February of each year to expand refugial habitat through the summer, and improve habitat quantity and availability throughout the year. The 4141.0 and 4139.0 minimum elevations required above may be compromised no more than two consecutive years regardless of the time period, and in no more than four of a ten year period to help maintain the potential for more consistent recruitment and age structure of the sucker populations (see the species accounts section for a more thorough explanation). During years when these elevations are compromised, a minimum surface elevation of 4137.0 feet from June 1st through September 30th must be maintained unless adequate access to, and quantity of, refugial areas can be assured at a surface elevation below 4137.0 feet, especially during periods of stressful water quality in Upper Klamath Lake. This assurance should include access to these areas with at least 18 inches of depth. Both water quality and quantity concerns regarding the refugial areas, as well as

access water depth, should be considered when making elevation decisions. In a year following compromised lake levels, if the following 4141.0 and 4139.0 feet levels required above are met, the year will not be counted as one of the four of ten compromised years allowed. The 1992 irrigation season, beginning October 1991, will be the first year of this regulation and considered one of the four years the minimum surface elevations can be compromised in the initial ten year period.

2. Reclamation shall implement a method to reduce entrainment of larval, juvenile, and adult Lost River and shortnose suckers into the A-Canal within five years of issuance of this biological opinion.

Clear Lake Reservoir

Because of the importance of water quality and quantity (especially in regards to depth) to the shortnose and Lost River suckers in Clear Lake, Reclamation shall:

1. Operate the project to assure a minimum reservoir elevation of 4524.0 feet from February 1st to April 15th of each year to allow access to Willow Creek for spawning and dispersal of returning larval suckers, and a minimum of 4523.0 feet from April 16th to January 31st of each year to provide areas of adequate depths to reduce desiccation, predation and freezing risks. The 4524.0 and 4523.0 elevations may be compromised no more than four years out of a ten year period and no more than four consecutive years in any time period to maintain the stable age structure of the sucker populations (see the species accounts section for a more thorough explanation). In a year following compromised lake levels, if the following 4524.0 and 4523.0 feet levels required above are met, the year will not be counted as one of the four of ten

compromised years allowed. The 1992 irrigation season, beginning October 1991, will be the first year of this regulation and considered one of the four years the minimum surface elevations can be compromised in the initial ten year period.

During years when these elevations are compromised, Reclamation shall make no water deliveries from the west lobe of Clear Lake when surface elevations are 4521.0 feet or less to provide adequate water quantity and quality for summer and winter survival of the endangered suckers. If an extended drought causes more than four of ten years to be compromised (lake elevations less than 4523 before or without any water releases), and the west lobe surface elevation is 4521.0 feet or greater, water releases out of the east lobe could be made. However, if the west lobe surface elevation is below 4521.0 feet, water from the east lobe will be delivered to the west lobe to maintain the highest possible west lobe elevation. Water remaining in the east lobe of Clear Lake then could be released to the Lost River. During years of west lobe elevation at or below 4521.0, no water may be delivered from the east lobe that would compromise west lobe elevations.

2. Develop and implement an aeration system for the dam refuge area referred to in item #5 that would assure adequate dissolved oxygen levels and open water during freezing periods. The Service realizes the potential of the lake to fall below minimum elevations in drought years even if no water is released. During extreme weather conditions access to Clear Lake is difficult and Reclamation will not be held liable for aeration system failures under these conditions. If water quality monitoring indicates that aeration is unnecessary, Reclamation may cease aeration of the eastern lobe with approval of the service.

3. Release no water from Clear Lake for any purpose (other than for an emergency, i.e., for flood control or maintenance of downstream sucker populations) until April 15th or until approximately 80 percent of the larval fish have returned to Clear Lake from the Willow Creek spawning area. This usually occurs under normal conditions by April 15. Water releases could be made prior to April 15th if observations by a fishery biologist, using a method approved by the Service, determines that 80 percent of larval suckers have returned to Clear Lake by an earlier date. This requirement may be deleted when the minimum surface elevations of 4524.0 and 4523.0 feet are compromised.
4. Reclamation will install and maintain a plug between the east and west lobes of Clear Lake by filling in a section of the existing channel to the 4521.0 feet elevation. This plug will be installed during the 1992 irrigation season to reduce the summer evaporation rate and potential for freezing in winter.
5. Following irrigation deliveries, maintain a pool immediately upstream of the dam at a 4522.0 feet surface elevation to provide refuge for at least 1000 adult suckers whenever drought conditions that could threaten the suckers in the west lobe occur.

Gerber Reservoir

1. Reclamation shall make no water deliveries from Gerber Reservoir when surface elevations are 4799.6 feet or less to maintain adequate water quantity and quality for summer and winter survival of shortnose suckers. Reclamation will monitor water quality on a weekly basis when this elevation is reached and provide aeration if necessary.

Tule Lake

1. The project must be operated to assure a minimum surface elevation of 4034.6 feet from April 1st to September 30th of each year to provide suckers spawning access, dispersal of larvae, and rearing habitat. A minimum elevation of 4034.0 feet must be maintained from October 1st to March 31st of each year to assure adequate depths to protect the suckers from predation and freezing. The shortage of depths greater than 2.5 feet in this lake could limit the number of fish that can survive stressful periods such as winters with thick ice or warm summers, even if it does not cause obvious fish kills. The winter elevation may be reduced to 4033.5 feet in years of heavy snow pack and high flood potential (as per Service approved operating criteria). The 4034.0 feet minimum elevation required above may be compromised to a minimum elevation of 4033.5 feet no more than two consecutive years and four of every ten years to allow for low water years. Compromises due to flood control needs will not be counted as one of the four of ten compromised years allowed. Aeration systems must be installed to assure adequate dissolved oxygen levels and open water during freezing periods if surface elevations are below 4034.0 feet. Aeration will not be required unless water quality monitoring in deeper areas of the lake indicates dissolved oxygen levels have been reduced to stressful levels. An alternative to the 4034.0 feet elevation requirement through the winter is to provide an equal or greater amount of water depth through dredging, sump rotation or other methods if approved by the Service. As required in the March 27, 1992 biological opinion, Reclamation shall monitor water quality and provide water from Upper Klamath Lake to improve water quality if needed. If the results of the flood plan study

in mitigation measure number 20 indicate a safety concern, consultation will be re-initiated.

2. A minimum flow of 50 cubic feet per second must be maintained in the Lost River below Anderson-Rose Dam for at least 4 weeks beginning April 1st of each year to allow spawning and return of adults and larval suckers. The flows required for spawning may be compromised no more than two consecutive years and four of every ten years to improve conditions for sucker populations with stable age structures. Reclamation shall also improve spawning conditions in the Lost River below the Anderson-Rose Dam by adding gravel substrate or other methods to improve the spawning habitat conditions.

Incidental Take under Reasonable and Prudent Alternative

Section 9 of the Act, as amended, prohibits any taking (harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or attempt to engage in any such conduct) of listed species of fish or wildlife without special exemption. Harm is further defined to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing behavioral patterns such as breeding, feeding, or sheltering. Under the terms of section 7(b)(4) and 7(o)(2), taking that is incidental to and not intended as part of the agency action is not considered a prohibited taking provided that such taking is in compliance with this incidental take statement.

In operating the Klamath Project, the Service anticipates the take and loss of all Lost River and shortnose suckers from Clear Lake and Gerber Reservoir that end up in the

Lost River and any associated water delivery systems or that leave Upper Klamath Lake through the A canal and end up in any of the associated water delivery systems. Also all suckers leaving Tule Lake via pumps or diversions and ending up in associated water delivery systems could be taken. Any suckers in the water delivery systems including canals, drains, fields, headgates, and turnouts could potentially be killed or harmed due to low water quality, chemical vegetation control, entrainment in pumps, increased predation, and desiccation. Any suckers that are trapped in the outlet structure of Gerber Reservoir or Clear Lake dams will be taken when the water flow is stopped. Suckers in the Klamath Project lakes and reservoirs could potentially be killed or harmed if water quality or quantity is reduced to stressful levels. Salvage operations could be required in any of the above situations. Consultation should be reinitiated if take occurs, or is expected to occur, as a result of the project or any interrelated or interdependent activity not specified in this biological opinion.

Additionally, during any salvage operation when suckers longer than 80mm are being moved, the Service anticipates that up to 125 individuals of Lost River or shortnose suckers (total - not each) may be taken. The Service establishes the following reasonable and prudent measures to minimize the impact of incidental take. The measures described below are nondiscretionary, and must be undertaken by Reclamation.

1. Salvage Lost River and shortnose suckers that remain in the canal systems that emanate from Upper Klamath Lake, Clear Lake, Tule Lake, and Gerber

Reservoir after these canals have been drawn down and drained.

2. Salvage Lost River and shortnose suckers from any lake or reservoir in the Klamath Project if water quality or quantity data indicates conditions that threatens the endangered suckers and the Service determines the action is warranted.
3. Reclamation shall implement a long-term plan to prevent and minimize take associated with the Klamath Project.

To be exempt from the prohibitions of Section 9 of the Act, the following terms and conditions, which implement the reasonable and prudent measures described above, must be complied with. All notices, plans, and other documents required below shall be prepared and implemented with the approval of the Service.

1. Reclamation shall conduct an annual salvage of suckers stranded in the canal systems and below outlet structures of dams. A salvage plan must be presented to the Service and appropriate state agencies for their approval prior to any salvage operation. Salvage sites will include all sites that yielded more than 20 suckers (above 80mm in total length) in 1991 salvage operations, and other sites as they are identified. During fall salvage operations from the canal systems, all suckers larger than 80 mm will be transferred to areas specified in Reclamation's salvage plan that must be approved by the Service.
2. Effective immediately, water quality and quantity must be monitored at least weekly, in any Project lake, river, or reservoir known to support endangered suckers, during time periods when those waters would have the potential to require a salvage operation (June through September unless conditions such

as low water levels dictate otherwise). Monitoring sites and methods must be approved by the Service. Water quality must also be monitored at any site used to hold suckers that are salvaged. A salvage plan for any salvage operation necessary before June 1, 1994 must be approved by the Service prior to the salvage.

3. Reclamation, in coordination with the Service and appropriate state agencies, shall develop a salvage plan by June 1, 1994 for all Klamath Project lakes, rivers, or reservoirs with established populations of endangered species that outlines salvage methods and transfer or holding sites. These plans would only be implemented if necessary and approved by the Service. Within three years of the issuance of this opinion, Reclamation shall; (a) complete a comprehensive survey of the Klamath Project service area below Clear Lake, Gerber Reservoir, and Upper Klamath Lake to delineate the location of potential sources of take, i.e., water pumps and diversions in sensitive areas, (b) develop and implement a program to reduce or eliminate this take, and (c) for educational purposes, notify landowners, irrigation districts, etc., that the potential for take exists and advise them of protection afforded listed species under the Act and ways to reduce or eliminate this take. This could involve changing the timing of pumping or diverting water, changing the location of pump intakes or changing the method and location of diversions.

Reporting Requirements:

Upon locating a dead, injured, or sick endangered or threatened species specimen, initial notification must be made to the nearest Service Law Enforcement Office. In

Oregon, contact the U.S. Fish and Wildlife Service, Division of Law Enforcement, District 1, P.O. Box 1910, Klamath Falls, Oregon 97601 (503/883-6900). In California, contact the U.S. Fish and Wildlife Service, Division of Law Enforcement, District 1, 2800 Cottage Way, Room E-1924, Sacramento, California 95825 (916/978-4861. Care should be taken in handling sick or injured specimens to ensure effective treatment and care and in handling dead specimens to preserve biological material in the best possible state for later analysis of cause of death. In conjunction with the care of sick or injured endangered species or preservation of biological materials from a dead animal, the finder has the responsibility to ensure that evidence intrinsic to the specimen is not unnecessarily disturbed.

The Service is to be notified within three (3) working days of the finding of any endangered or threatened species found dead or injured in the Klamath Project service area. Notification must include the date, time, and precise location of the injured animal or carcass, and any other pertinent information. In Oregon, the Service contract person for this information is Mr. Russell D. Peterson (503/231-6179 and in California, the contact person is Mr. Wayne White (916/978-4613. Any Lost River suckers or shortnose suckers found dead or injured in California shall be turned into the CDFG. The agency contact is Ms. Carla Markmann (916/355-7114),

If, during the course of the action, the amount or extent of the incidental take limit is exceeded, the Federal agency must reinitiate consultation with the Service immediately.

Conservation Recommendations

Section 7(a)(1) of the Act directs Federal agencies to utilize their authorities to further the purposes of the Act by carrying out conservation programs for the benefit of endangered and threatened species. The term "conservation recommendations" is defined as suggestions from the Service regarding discretionary measures (1) to minimize or avoid adverse effects of a proposed action on listed species or critical habitat, (2) conduct studies and develop information, and (3) promote the recovery of listed species. The recommendations provided here relate only to the proposed action and do not necessarily represent complete fulfillment of the agency's 7(a)(1) responsibilities.

1. The Service recommends that Reclamation assist the Klamath Tribe in improving larval rearing habitat in the lower Williamson River.
2. The Service also recommends establishing a population of Lost River suckers in Gerber Reservoir with broodstock from Clear Lake when elevations at Gerber Reservoir improve to more normal levels.

To be kept informed of actions that either minimize or avoid adverse effects or that benefit listed species or their habitats, the Service requests notification of the implementation of any conservation recommendations.

This concludes formal consultation on proposed action described in the Biological Assessment and modified by Reclamation's memorandum dated September 19, 1991. Reinitiation of formal consultation is required if (1) the amount or extent of incidental take is exceeded, as previously described, (2) the provisions and requirements

under the *Incidental Take* section are not implemented, (3) new information reveals effects of the action that may affect listed species or critical habitat in a manner that was not considered in this opinion, (4) commitments and time lines described in the *Project Description* to offset and avoid project related impacts are not met or adhered to, and/or (5) a new species is listed or critical habitat is designated that may be affected by the action. If you have any questions regarding this opinion, please contact Wayne White of my staff at (916) 978-4613.

/s/ Marvin L. Plenert
MARVIN L. PLENERT

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FACTUAL DATA ON THE KLAMATH PROJECT

IRRIGATION PLAN

The Klamath Project on the Oregon-California border in Oregon's Klamath County and California's Siskiyou and Modoc Counties was one of the earliest Federal reclamation projects. In early 1905, Oregon and California State Legislatures ceded title in Lower Klamath and Tule Lakes to the United States for project development under provisions of the Reclamation Act of 1902. Construction was authorized by the Secretary of the Interior on May 15, 1905, for project works to drain and reclaim lakebed lands of the Lower Klamath and Tule Lakes, to store waters of the Klamath and Lost Rivers, to divert irrigation supplies, and to control flooding of the reclaimed lands. Under provisions of the Reclamation Act, project costs were to be repaid through the sale of water rights to homesteaders on the reclaimed project lands.

WATER SUPPLY

Two main sources supply the water for the Klamath Project. One consists of upper Klamath Lake and the Klamath River, and the other consists of Clear Lake Reservoir, Gerber Reservoir, and Lost River, which are located in a closed basin. The total drainage area which includes the Lost River and Klamath River watersbed above Keno is approximately 5,700 mi² (1470 x 10² ha).

FEATURES OF THE PROJECT PLAN

LINK RIVER DAM on Link River at the head of the Klamath River and just west of Klamath Falls, Oregon, regulates flow from Upper Klamath Lake Reservoir. This reservoir is a principal source of water supply for the project. The dam is a reinforced concrete slab structure, with a height of 22 ft (7m) and a crest length of 435 ft (133m). The reservoir has a capacity of 735,000 acre-ft ($907 \times 10^2 \text{ m}^2$) and is operated by the Pacific Power and Light Company, subject to Klamath Project rights.

GERBER DAM and Reservoir on Miller Creek, 14 mi (23 km) east of Bonanza, Oregon, provides storage for irrigation and reduces flow into the reclaimed portions of Tule Lake and the restricted sump areas in the Tule Lake National Wildlife Refuge. The dam is a concrete arch structure, with a height of 84.5 ft (25.8 m) and a crest length of 478 ft (146 m). The reservoir has a capacity of 94,000 acre-ft ($116 \times 10^2 \text{ m}^2$).

CLEAR LAKE DAM and Reservoir on Lost River in California, about 19 mi (31 km) southeast of Malin, Oregon, provides storage for irrigation and reduces flow into the reclaimed portion of Tule Lake and the restricted sump areas in Tule Lake National Wildlife Refuge. The dam is an earth and rock fill structure, with a height of 42 ft (13 m) and crest length of 840 ft (256 m). The reservoir has a capacity of 527,000 acre-ft ($650 \times 10^2 \text{ m}^2$).

MALONE DIVERSION DAM on Lost River, about 11 mi (18 km) downstream from Clear Lake Dam, diverts water to serve lands in Langell Valley. The dam and earth embankment with a concrete gate structure, has a height of 32 ft (10 m) and a crest length of 515 ft (157 m).

LOST RIVER DIVERSION DAM on Lost River, about 4 mi (6 km) below Olene, Oregon, diverts excess water to the Klamath River through the Lost River Diversion Channel and thereby controls downstream flow in Lost River to control or restrict flooding of the reclaimed portions of the Tule Lake bed and to regulate sumps of the Tule Lake National Wildlife Refuge. It is a horseshoe-shaped, multiple-arch concrete structure with earth embankment wings. The structure height is 42 ft (13 m) and the crest length is 675 ft (206 m).

LOST RIVER DIVERSION CHANNEL extends from the Lost River Diversion Dam to the Klamath River, a distance of nearly 8 mi (13 km). The channel carries excess water to the Klamath River and also supplies additional irrigation water from the Klamath River by reverse flow from the reclaimed lakebed lands of Tule Lake.

ANDERSON-ROSE DAM on the Lost River, about 3 mi (5 km) southeast of Merrill, Oregon, diverts water to serve the lands reclaimed from the bed of Tule Lake. The dam is a reinforced concrete slab and buttress structure with a height of 23 ft (7 m) and a crest length of 324 ft (99 m).

MILLER DIVERSION DAM on Miller Creek, 8 mi (13 km) below Gerber Dam, diverts water to serve lands in Langell Valley. The dam is a concrete weir, removable crest, and earth embankment wing structure, with a height of 32 ft (10 m) and crest length of 290 ft (88 m).

PUMPING PLANTS. There are 5 major pumping plants with power input ranging from 450 to 3,650 hp (336 to 2722 kW) and capacities from 60 to 300 ft³/s (1.7 to 8.5

m²/s), and 40 pumping plants of less than 1,000 hp (746 kW).

CANALS, LATERALS, AND DRAINS. There are 18 canals with a total length of 185 mi (298 km) and diversion capacities ranging from 35 to 1,150 ft²/s (1 to 33 m²/s). Laterals total 516 mi (830 km) and drains 728 mi (1172 total km).

TULE LAKE TUNNEL. A concrete-lined tunnel 6,600 ft (2000 m) in length and with a capacity of 300 ft²/s (8 m²/s) conveys drainage water from Tule Lake restricted sumps to Lower Klamath Lake.

KLAMATH STRAITS DRAIN. The enlarged 600 ft²/s (17 m²/s) drain conveys drainage water from Lower Klamath National Wildlife Refuge and irrigated land which has been reclaimed from Lower Klamath Lake. The drain, which extends from the State Line Road northwesterly to Klamath River, removes the excess winter flows and the drainage from the lower basin, a closed basin, to the Klamath River.

IRRIGABLE ACRES

The project area includes 233,625 acres (94 545 ha) of irrigable lands of which 204,492 acres (82758 ha) were irrigated by the project in 1979.

SOILS

Soil varies from sandy loam to peaty and clay loams throughout the irrigable areas.

IRRIGATION SEASON

The average irrigation season extends from April through September. The growing season varies considerable from year to year, but averages approximately 120 days from about May 15 to September 15.

PRECIPITATION AND TEMPERATURE

The annual precipitation over the project area averages about 14 in (356 mm). At Klamath Falls temperatures have ranged between recorded extremes of 105 °F (41 °C) and -24 °F (-31 °C). Temperatures average about 67 °F (19 °C) during July and August, 29 °F (-2 °C) during the coldest winter month and about 48 °F (9 °C) for the year.

PRINCIPAL PRODUCTS AND MARKETS

The principal crops grown in this area are cereal grains, alfalfa hay, irrigated pastures for beef cattle, onions, potatoes, and grass seed. The area is noted for the production of malting barley. With excellent rail connections to San Francisco and Portland, both within a distance of 400 mi (644 km) from the project area, the principal markets for agricultural products are in Oregon and California, and adjoining states.

BASIN GEOGRAPHY

The Upper Klamath River Basin as shown on the above map encompasses an area of about 9,500 mi² (2460 x 10² ha), including the Klamath Project service area. The terrain varies from rugged, heavily timbered mountain

slopes to rolling sagebrush benches and broad flat valleys. Most of the valleys of the basin are high and comparatively flat valleys. Most of the valleys of the basin are high and comparatively flat; the elevation above sea level ranging from 2,600 ft (792 m) in Scott Valley to 5,000 ft (1524 m) in the Sycan Marsh. The highest of the mountains is Mt. Shasta, 14,161 ft (4316 m) above sea level. Forest lands total about two-thirds of the basin area and most of the remaining third is arable land.

HOMESTEAD LANDS

Oregon and California legislation which relinquished state title to project lands, and congressional action which directed the project undertaking, provided for disposition of the reclaimed lands in accordance with the 1902 Reclamation Act. Under provisions of the act, the reclaimed public lands were to be opened for homesteading, subject to water right charges designed to repay project costs. The first public lands were opened for homestead in March 1917, for Unit 3 of the Main Division which included 3,250 acres (1315 ha) of private lands and 2,700 acres (1093 ha) of public lands. The 1917 land opening notice announced a construction charge of \$39 per irrigable acre for land already in private ownership and \$45 per irrigable acre for unentered public land. Reclaimed lands in the Tule Lake Division were opened for homestead entry under 10 different public notices - the first in 1922 and the last in 1948. In total, about 44,000 acres (18 x 10²) making up 614 farm units were homesteaded in the Tule Lake Division. The 1922 homestead notice, later recalled, included a construction charge of \$90 per irrigable acre. Subsequent land openings in the Tule Lake

Division included a construction charge of \$88.35 per acre, contingent on the landowners forming an irrigation district to assume joint liability for construction costs.

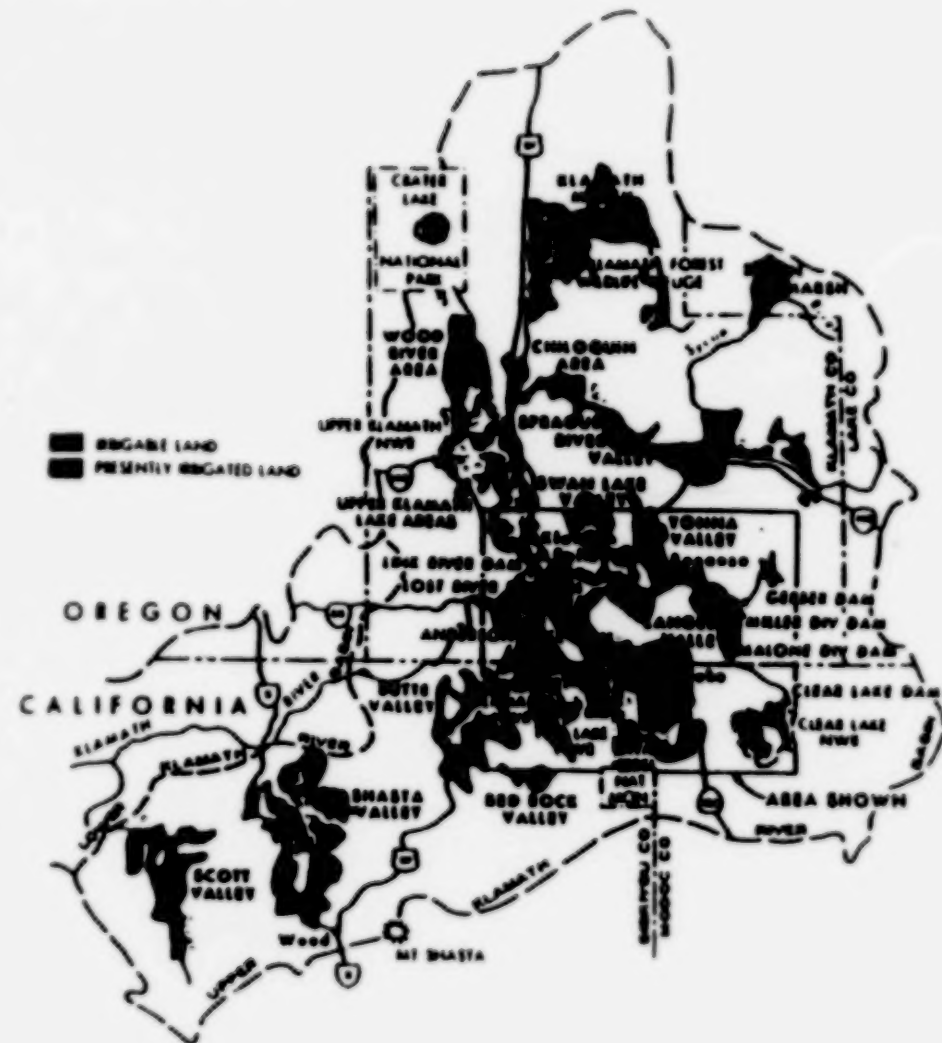
PUBLIC LEASE LANDS

As Tule Lake receded, reclaimed lands were leased for farming before opening to homestead. The practice of leasing served to develop and improve the land during the construction of irrigation and drainage facilities to serve farm units and permit homestead entry. To protect developed homestead lands from flooding, areas at lower elevations were designated as sump areas and reserved for flood control and drainage. Some of the marginal sump acreage subject to less frequent flooding was made available for leasing, but retained in Federal ownership. In addition to providing flood control, the reserved sump areas also preserved existing marsh habitat which has subsequently been included within the basin's national wildlife refuge areas.

NATIONAL WILDLIFE REFUGES

A strategic junction in the routes of the Pacific Flyway, the Klamath Basin annually receives the largest concentration of migratory waterfowl in North America. During migration, the area provides feeding and resting grounds for more than 5 million ducks and geese. By Executive Order in 1906, President Theodore Roosevelt established the Lower Klamath Lake area as the first Federal wildlife refuge for waterfowl in the Nation. Today the Klamath Basin is the site of five national wildlife refuges: the Lower Klamath, Tule Lake, Clear Lake,

and Upper Klamath refuges within the Klamath Project service area, and the Klamath Forest National Wildlife Refuge north of the project area. In addition to wildlife conservation, a key function of the refuge areas is to decrease crop depredation in California's Central and Imperial Valleys. Refuge areas attract and delay the migrating birds during harvest of rice and other valley crops. Provisions for waterfowl management purposes are included in Public Lease Land agreements to provide for the growing of grain and cereal crops for waterfowl forage. The bulk of waterfowl food is gleaned by the birds from the lease lands after harvest. Additional acreage in the refuge areas is farmed by the Fish and Wildlife Service specifically for waterfowl food, nesting habitat, and cover.



RECREATION, FISH, AND WILDLIFE

While migrating waterfowl are the most widely recognized wildlife feature of the basin, a variety of other animals, birds, and fish inhabit the area. Game resources include deer, elk, antelope, bear, and cougar. Furbearers include muskrat, beaver, and mink. Upland game birds include 10 species, most notably doves, pheasant, grouse, and quail. Rainbow trout is the most important game fish

found in relatively large numbers and most sought by fishermen. Basin fishery also includes three other major species of trout, two species of landlocked salmon, and eight species of warm-water game fish. Recreation and tourism the fastest growing industry, ranks third as a contributor to the basin's economy, following agriculture and timber. Sport hunting of waterfowl at refuge public shooting grounds brings into commercial channels substantial sums of money each year. The spectacular sight of millions of ducks and geese, and thousands of other water and marsh birds on the Federal refuges is a prime tourist attraction. Klamath Project reservoirs join other federally administered parks and forest areas as major recreation sites, providing opportunities for fishing, swimming, boating, skiing, camping, and picnicking.

HYDROELECTRIC POWER

By contract executed in 1917, the United States authorized California-Oregon Power Company (now the Pacific Power and Light Company) to construct Link River Dam. The dam, deeded to the United States, is operated and maintained by the power company in accordance with project needs. Under the contract all irrigation rights and requirements are protected and water users of the Klamath Project are provided for as preference power customers. The original contract was amended in 1956 and extended for a 50-year period.

OPERATING AGENCIES

Clear Lake Dam, Gerber Dam, and Lost River Diversion Dam are operated by the Bureau of Reclamation;

Link River Dam is operated by Pacific Power and Light Company; Anderson-Rose Dam is operated by Tulelake Irrigation District; and Malone and Miller Diversion Dams are operated by Langell Valley Irrigation District. Project canals and pumping plants are operated by the various irrigation districts. Recreational facilities at Lower Klamath Lake, Tule Lake, and Upper Klamath Lake are administered by the Fish and Wildlife Service. The Bureau of Land Management administers Gerber Reservoir recreation facilities. Recreation facilities at Malone and Wilson reservoirs are administered by the Bureau of Reclamation. National wildlife refuges in the Klamath Basin are administered by the Fish and Wildlife Service as part of the national wildlife refuge system.

Address all inquiries regarding additional information concerning this project to:

Regional Director, Mid-Pacific Region
Bureau of Reclamation
2800 Cottage Way
Sacramento, California 96826-1986

MAY 23 1996

CLERK

No. 95-813

In The
Supreme Court of the United States
October Term, 1995

BRAD BENNETT, et al.,

Petitioners,

vs.

MARVIN PLENERT, et al.,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

Under the citizen suit provision of the Endangered Species Act of 1973 (16 U.S.C. 1540(g)(1)) "any person" may commence a civil suit on his own behalf to enjoin the United States from violating the provisions of the Act or regulations issued thereunder. The questions presented are:

1. Whether the broad standing mandated by Congress in the citizen suit provision of the Endangered Species Act is subject to a zone of interest test as a further, judicially imposed, prudential limitation on standing;
2. If standing to sue under the Endangered Species Act is subject to prudential limitations, whether those limitations permit only environmental plaintiffs to challenge government conduct alleged to violate the terms of the Act or whether claims of economic injury raised by public water suppliers and water users are also within the zone of interests protected or regulated by the Act.

PARTIES

The petitioners are the Langell Valley Irrigation District and the Horsefly Irrigation District, each of which is organized as a political subdivision of the State of Oregon, and Brad Bennett and Mario Giordano, individuals resident in the State of Oregon.

The respondents are Marvin Plenert, the Regional Director, Region One of the United States Fish and Wildlife Service; John F. Turner, Director of the United States Fish and Wildlife Service; and Bruce Babbitt, Secretary of the United States Department of the Interior.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
1. Nature of the Controversy	2
2. Proceedings Below	7
SUMMARY OF ARGUMENT	11
ARGUMENT	17
I. BY DRAFTING THE CITIZEN SUIT PROVISION OF THE ENDANGERED SPECIES ACT BROADLY TO ENCOMPASS "ANY PERSON," CONGRESS EXPANDED STANDING TO THE FULL EXTENT PERMITTED BY ARTICLE III OF THE CONSTITUTION	17
II. EVEN IF A ZONE TEST APPLIES, PETITIONERS ARE WELL WITHIN THE ZONE OF INTERESTS REGULATED BY THE ENDANGERED SPECIES ACT	25
III. THE RANGE OF INTERESTS PROTECTED BY THE ENDANGERED SPECIES ACT ENCOMPASSES THE INTERESTS ASSERTED BY PETITIONERS	30

TABLE OF CONTENTS - Continued

	Page
(a) Congress Explicitly Required a Balancing of Impacts as Part of the Designation of Critical Habitat	30
(b) Congress Amended the ESA To Require That Biological Opinions Be Based Upon Scientific and Commercial Data, Not Speculation	33
(c) Congress Amended the ESA to Require Consideration of Economic Feasibility in the Development of Biological Opinions	37
(d) Congress Explicitly Required Federal Agencies to Cooperate With State and Local Agencies to Resolve Water Resources Issues in Concert With the Conservation of Endangered Species ...	40
IV. THE ALLEGATIONS OF PETITIONERS' COMPLAINT SATISFY THE IRREDUCIBLE MINIMUM STANDING ELEMENTS ESTABLISHED BY ARTICLE III OF THE CONSTITUTION.....	41
V. RESPONDENTS ENJOY NO IMMUNITY FROM COURT REVIEW IF THEY ISSUE A FLAWED BIOLOGICAL OPINION OR OVER-REGULATE IN THE NAME OF SPECIES PRESERVATION	45
VI. CONCLUSION	48

TABLE OF AUTHORITIES

	Page(s)
CASES:	
<i>Arnold Tours, Inc. v. Camp</i> , 401 U.S. 45 (1970).....	29
<i>Association of Data Processing Service Organizations v. Camp</i> , 397 U.S. 150 (1970)	11, 18, 24, 25, 29, 30
<i>Babbitt v. Sweet Home Chapter of Communities</i> 515 U.S. ____ 132 L. Ed. 2d 597 (1995)	25, 36, 47
<i>Barlow v. Collins</i> , 397 U.S. 159 (1970).....	11, 18, 46
<i>Block v. Community Nutrition Institute</i> , 467 U.S. 340 (1984)	46
<i>Catron County Board of Commissioners v. United States Fish and Wildlife Service</i> , ____ F.3d ____ 1996 U.S. App. Lexis 1479 (10th Cir. 1996)	24
<i>Citizens to Preserve Overton Park v. Volpe</i> , 401 U.S. 402 (1971).....	46
<i>Clarke v. Securities Industry Association</i> , 479 U.S. 388 (1987).....	26, 27, 30
<i>Columbia Broadcasting System v. United States</i> , 316 U.S. 407 (1941)	28
<i>Competitive Enterprise Institute v. National Highway Traffic Safety Administration</i> , 901 F.2d 107 (D.C. Cir. 1990)	22
<i>Connor v. Burford</i> , 848 F.2d 1441 (9th Cir. 1988).....	37
<i>Consumers Union v. Federal Trade Commission</i> , 691 F.2d 575 (D.C. Cir. 1982), <i>aff'd</i> , 463 U.S. 1216 (1983)	23
<i>Cotovsky-Caplan Physical Therapy Assn. v. United States</i> , 507 F.2d 1363 (7th Cir. 1975).....	29

TABLE OF AUTHORITIES - Continued

	Page(s)
<i>Defenders of Wildlife v. Hodel</i> , 851 F.2d 1035 (8th Cir. 1988).....	22
<i>FCC v. Sanders</i> , 309 U.S. 470 (1940).....	30
<i>Family and Children's Center v. School City</i> , 13 F.2d 1052 (7th Cir.), cert. denied, 115 S. Ct. 420 (1994)	22
<i>Gladstone Realtors v. Village of Bellwood</i> , 441 U.S. 91 (1976)	18, 19, 22, 24
<i>Gollust v. Mendell</i> , 501 U.S. 115 (1991).....	17
<i>Greenpeace Action v. Franklin</i> 14 F.3d 1324, 1336 (9th Cir. 1992).....	36, 37
<i>Havens Realty Corp. v. Coleman</i> , 455 U.S. 363 (1982)	17
<i>Humane Soc. of the U.S. v. Hodel</i> , 840 F.2d 45 (D.C. Cir. 1988)	24
<i>Investment Company Institute v. Camp</i> , 401 U.S. 617 (1971)	29
<i>Japan Whaling Association v. American Cetacean Society</i> , 478 U.S. 221 (1987)	46
<i>Jeffers v. United States</i> , 432 U.S. 137 (1977).....	40
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. ____ 119 L. Ed. 2d 351	passim
<i>Lujan v. National Wildlife Federation</i> , 497 U.S. 871, 889 (1990)	42
<i>Mausolf v. Babbitt</i> , 913 F. Supp. 1334 (D. Minn. 1996).....	34, 47
<i>Middlesex City Sewerage Auth. v. Nat. Sea Clammers</i> , 453 U.S. 1 (1981)	21

TABLE OF AUTHORITIES - Continued

	Page(s)
<i>National Audubon Society v. Hester</i> , 801 F.2d 405 (D.C. Cir. 1986).....	24
<i>National Organization of Women v. Scheidler</i> , 510 U.S. ____ 127 L. Ed. 2d 99 (1994).....	42
<i>North Haven Bd. of Educ. v. Bell</i> , 456 U.S. 512 (1982)	39
<i>Pacific Legal Foundation v. Andrus</i> , 657 F.2d 829 (6th Cir. 1981)	35
<i>Sierra Club v. Morton</i> , 405 U.S. 727 (1972)	21
<i>State of Idaho By and Thru Idaho Public Utilities Commission v. ICC</i> , 35 F.3d 585, 592 (D.C. Cir. 1994).....	24
<i>Swan View Coalition v. Turner</i> , 824 F. Supp. 923 (D. Mont. 1992)	22
<i>Trafficante v. Met. Life Ins. Co.</i> , 409 U.S. 205 at 209 (1972)	19
<i>Tribal Village of Akutan v. Hodel</i> , 869 F.2d 1185 (9th Cir. 1988)	44
<i>United States v. SCRAP</i> , 412 U.S. 669 (1973)	42
<i>United States v. Storer Broadcasting Co.</i> , 351 U.S. 192 (1956)	28
<i>Warth v. Seldin</i> , 422 U.S. 490 (1975)	18
<i>Weinberger v. Rossi</i> , 456 U.S. 25 (1982).....	39
<i>Westlands Water Dist. v. U.S. Dept. of Interior</i> , 850 F. Supp. 1388 (E.D. Cal. 1994).....	44

TABLE OF AUTHORITIES - Continued

Page(s)

STATUTES AND CODE OF FEDERAL REGULATIONS:

Administrative Procedure Act (5 U.S.C. §§ 701 <i>et seq.</i>)	7
Endangered Species Act:	
16 U.S.C. § 1531(c)	40
16 U.S.C. § 1531(c)(2)	14
16 U.S.C. § 1532(13)	2, 19, 20
16 U.S.C. § 1533	3, 30
16 U.S.C. § 1533(b)(2)	9, 12
16 U.S.C. § 1536	4, 7
16 U.S.C. § 1536(a)(2)	8, 43
16 U.S.C. § 1536(b)(3)(A)	13, 38
16 U.S.C. § 1536(b)(4)	44
16 U.S.C. § 1536(o)(2)	44
16 U.S.C. § 1539(a)(1)(B)	6
16 U.S.C. § 1540(a), (b)	6, 44
16 U.S.C. § 1540(g)(1)	2, 20
16 U.S.C. § 1540(g)(1)(A), (C)	20, 46
16 U.S.C. § 1540(g)(2)(A)	7
16 U.S.C. § 1540(g)(3)(A)	20
Fair Housing Act of 1968	
42 U.S.C. §§ 3601 <i>et seq.</i>	18

TABLE OF AUTHORITIES - Continued

Page(s)

Judiciary and Judicial Procedure

28 U.S.C. § 516	28
28 U.S.C. § 1254(1)	1
Marine Protection, Research and Sanctuaries Act	
33 U.S.C. §§ 1401 <i>et seq.</i>	21
National Environmental Policy Act, 42	
U.S.C.A. §§ 4321 <i>et seq.</i> (NEPA)	35
Reclamation Act	
43 U.S.C. §§ 371 <i>et seq.</i>	2
50 C.F.R. § 402.02	39
50 C.F.R. § 402.14(i)(1)(iv)	44
50 C.F.R. § 402.14(i)(5)	44
50 C.F.R. § 402.15(b)	43
OTHER:	
Wright, Miller & Cooper, <i>Federal Practice and Procedure: Jurisdiction</i> 2d § 3531.7 (1995 Supplement)	27
Fletcher, <i>The Structure of Standing</i> , 98 Yale L.J. 221, 229 (1988)	18, 27
Stewart, <i>Standing for Solidarity</i> , 88 Yale L.J. 1559, 1569 (1979)	18
Sunstein, <i>What's Standing After Lujan? of Citizen Suits, 'Injuries' and Article III</i> , 91	18

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit (App. to Pet. 1-18) is reported at 63 F.3d 915. The decision of the United States District Court (App. to Pet. 19-30) is not reported.

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was filed and entered on August 24, 1995. A Suggestion for Rehearing En Banc was filed with the Ninth Circuit on October 23, 1995, and denied on November 20, 1995. The Petition for Writ of Certiorari was filed on November 21, 1995 and granted on March 25, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 11(g)(1) of the Endangered Species Act states:

"Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf -

"(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof."

(C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary." (81 Stat. 884, 16 U.S.C. § 1540(g)(1))

Section 3(13) of the Endangered Species Act, in turn, provides:

"The term 'person' means an individual, corporation, partnership, trust, association, or any other private entity, or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State or political subdivision thereof, or of any foreign government; any State, municipality or political subdivision of a State; or any entity subject to the jurisdiction of the United States." (16 U.S.C. § 1532(13))

STATEMENT OF THE CASE

1. Nature of the Controversy

The Klamath Project was constructed by the Bureau of Reclamation ("Bureau") in the early part of this century for the purpose of providing irrigation water to reclaimed project lands. (Jt.App., p. 107) Developed along the Oregon-California border pursuant to the Reclamation Act of 1902 (generally 43 U.S.C. §§ 371 *et seq.*) the eastern portion of the project includes Clear Lake and Gerber reservoirs, constructed by the Bureau to provide a

water supply to farmers and ranchers in Southern Oregon. (App. to Pet., p. 35; Jt.App., p. 107)¹

Throughout most of the twentieth century, the Bureau utilized long-standing procedures for storing and releasing water from the project, including Clear Lake and Gerber reservoirs, in order to produce a reliable supply of water for irrigation purposes. (App. to Pet., p. 36) *Inter alia*, a portion of this water was provided to the petitioners — two small irrigation districts organized as political subdivisions of the State of Oregon and two individual ranchers resident in Oregon — who receive their primary supply of irrigation water from the two reservoirs under federal contract. (*Id.* at pp. 33-34)

In 1988, pursuant to Section 4 of the ESA (16 U.S.C. § 1533), the United States Fish and Wildlife Service ("USFWS") listed the Lost River sucker (*Deltistes luxatus*) and shortnose sucker (*Chasmistes brevirostris*) as endangered species of fish. (53 Fed.Reg. 27130-27135) Both species are found in some reservoirs of the Klamath Project, including Clear Lake Reservoir where their population is

¹ The Klamath project is one of the earliest federal reclamation projects. In 1905, the Oregon and California legislatures ceded title in Lower Klamath and Tule lakes to the United States for project development. (Jt.App., p. 107) Construction was authorized by the Secretary of the Interior on May 15, 1905, for project works to drain and reclaim lakebed lands of the Lower Klamath and Tule lakes to store waters of the Klamath and Lost rivers, to divert irrigation supplies, and to control flooding of the reclaimed lands. (*Id.*) Under provisions of the Reclamation Act, project costs were to be repaid through the sale of water rights to homesteaders on the reclaimed project lands. (*Id.*)

considered "sizeable." (Jt.App. p. 54) "Good numbers" of shortnose suckers are also found in Gerber Reservoir. (*Id.*)

Following the listing, the Bureau and the USFWS entered into a formal consultation pursuant to Section 7 of the ESA (16 U.S.C. § 1536) regarding the effects of long-term operation of the Klamath Project on the fish. (Jt.App., pp. 18-117) For this purpose, the Bureau proposed a long-term Klamath project operational regime which included some 20 "conservation actions" intended to protect listed species. (*Id.* pp. 21-31) None of the Bureau's proposed operational actions included any reduction in storage releases from Clear Lake or Gerber reservoirs, including reductions made for the purpose of maintaining minimum reservoir levels. (*Id.*)

As a result of the consultation regarding project operations, the USFWS, on July 22, 1992, issued a biological opinion which concluded that the long-term operation of the Klamath project proposed by the Bureau "is likely to jeopardize the continued existence of the Lost River and shortnose suckers." (App. to Pet., p. 37; Jt.App., p. 20) In view of this conclusion, the biological opinion set forth a "Reasonable and Prudent Alternative" to the Bureau's proposed long-term Project operation which, in the opinion of the USFWS "would avoid the likelihood of jeopardizing the continued existence of listed species or result in the destruction or adverse modification of critical habitat." (Jt.App., p. 86)

With respect to both Gerber and Clear Lake reservoirs, respondents' "Reasonable and Prudent Alternative" imposes restrictions on water deliveries intended to

reduce such deliveries and thereby maintain minimum reservoir elevations.² (App. to Pet., p. 39; Jt.App., pp. 88-92) In doing so, however, respondents' opinion never points to any scientific evidence indicating that the withdrawal of irrigation water from the two reservoirs is damaging to the "sizeable" number of fish already found therein or that maintaining a high surface water level in the reservoirs will increase their already "good numbers." Nor does the biological opinion consider the impact of reduced water deliveries upon petitioners or the communities of which they are a part. It does not, for example, consider the petitioners' need for, and reliance upon, water from Gerber and Clear Lake reservoirs. Nor does the biological opinion evaluate the impacts of

² With respect to Gerber Reservoir, the Reasonable and Prudent Alternative provides:

"Reclamation shall make no water deliveries from Gerber Reservoir when surface elevations are 4799.6 feet or less to maintain adequate water quantity and quality for summer and winter survival of shortnose suckers. Reclamation will monitor water quality on a weekly basis when this elevation is reached and provide aeration if necessary." (Jt.App., p. 90)

With respect to Clear Lake Reservoir, the Reasonable and Prudent Alternative provides, in relevant part, that the Bureau shall:

"Operate the project to assure a minimum reservoir elevation of 4524.0 feet from February 1st to April 15th of each year to allow access to Willow Creek for spawning and dispersal of returning larval suckers, and a minimum of 4523.0 feet from April 16th to January 31st of each year to provide areas of adequate depths to reduce desiccation, predation and freezing risks." (Jt.App., p. 88)

reduced water deliveries upon petitioners and their communities in determining the reasonableness of its "Reasonable and Prudent Alternative." Finally, the opinion describes no effort whatsoever to cooperate with state and local agencies to conserve endangered species in concert with the resolution of water resource issues.

After setting forth its Reasonable and Prudent Alternative, respondents' biological opinion then includes a statement of "Incidental Take under Reasonable and Prudent Alternative." (Jt.App., pp. 92-96) In essence, the incidental take statement describes the take of species expected to occur as a result of implementation of the opinion's Reasonable and Prudent Alternative and - so long as the Bureau adheres to the conditions of the Reasonable and Prudent Alternative in its operation of the Klamath Project - gives permission for such a take to occur.³ (*Id.*) Absent such authorization, the Bureau and its employees would remain subject to the substantial civil and criminal penalties set forth in Sections 11(a)(1) and 11(b)(1) of the ESA (16 U.S.C. § 1540(a)(1), 1540(b)(1)) if

³ The issuance of an incidental take statement is authorized by Section 10(a)(1)(B) of the ESA (16 U.S.C. § 1539(a)(1)(B)) which provides:

"The Secretary may permit, under such terms and conditions as he shall prescribe -

(B) any taking otherwise prohibited by Section 1538(a)(1)(B) of this title [relating to the 'take' of species within the United States or its territorial sea] if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."

operation of the Klamath Project resulted in the take of any listed, endangered species.

2. Proceedings Below

On November 12, 1992, petitioners served respondents with a 60-day written notice of violation and notice of intent to sue regarding the biological opinion for the Klamath Project.⁴ (Jt.App., pp. 2-17) Incorporated into the 60-day notice and made a part thereof was petitioners' Complaint for Declaratory and Injunctive Relief, subsequently filed in the United States District Court for the District of Oregon on March 8, 1993. (App. to Pet., pp. 31-44)

By their Complaint, petitioners alleged, *inter alia*, a violation of Section 7 of the ESA (16 U.S.C. § 1536) and the Administrative Procedure Act (5 U.S.C. §§ 701 *et seq.*) resulting from respondents' imposition of restrictions on the withdrawal of irrigation water from Clear Lake and Gerber reservoirs. (App. to Pet., p. 41) These restrictions,

⁴ Petitioners' 60-day notice was filed pursuant to Section 11(g)(2)(A) of the ESA (16 U.S.C. § 1540(g)(2)(A)) which provides:

"No action may be commenced under subparagraph (1)(A) of this section [providing for civil actions to enjoin any person, including the United States, alleged to be in violation of the Act] -

(i) prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation."

it was alleged, adversely affect the petitioners by substantially reducing the quantity of irrigation water available to them. (*Id.* at 40) Moreover, the restrictions were imposed in the absence of any scientific evidence that the withdrawal of irrigation water from Clear Lake or Gerber reservoirs was damaging to the fish or that retaining irrigation water in the reservoirs would help them. (*Id.* at 37, 39) Thus, not only did respondents violate Section 7 by using junk science rather than the "best scientific and commercial data available"⁵ but, they did so without regard to the injury caused to petitioners. (*Id.* at 38-41)

Petitioners' Complaint also alleged that respondents' imposition of water delivery restrictions to maintain minimum lake levels was an implicit determination of critical habitat for the Lost River and shortnose suckers in Clear Lake and Gerber reservoirs. (*Id.* at 42) Because that determination occurred without any consideration of the economic impact of doing so, the Complaint alleged a

⁵ Section 7(a)(2) of the ESA (16 U.S.C. § 1536(a)(2)) requires that "the best scientific and commercial data available" shall be utilized in fulfilling the consultation requirement:

"Each federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat which is determined by the Secretary . . . to be critical, unless such agency has been granted an exemption for such action. . . . In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available." (Emphasis added)

violation by respondents of Section 4(b)(2) of the ESA (16 U.S.C. § 1533(b)(2))⁶ and the provisions of the Administrative Procedure Act. (App. to Pet., p. 42) Based upon their claims, petitioners requested the trial court to compel respondents to withdraw their biological opinion and to declare respondents' actions to be in violation of both Sections 4 and 7 of the ESA. (*Id.* at 43-44)

Respondents moved to dismiss the complaint on the ground that petitioners lacked standing. (*Id.* at 20) In an unpublished order issued November 18, 1993, the District Court agreed that petitioners lacked prudential standing to sue under the ESA. (*Id.*)

On appeal, the Ninth Circuit upheld the District Court and rejected the contention that the citizen suit language of Section 11(g) of the ESA abrogates prudential barriers to standing. (App. to Pet., p. 11) Finding that such a contention, if accepted, would permit plaintiffs to sue even though their

⁶ Section 4(b)(2) of the Endangered Species Act provides:

"The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in extinction of the species concerned." (16 U.S.C. § 1533(b)(2))

purposes were "plainly inconsistent with, or only 'marginally related' to, those of the Act . . ." the Ninth Circuit held that "only plaintiffs who allege an interest in the *preservation* of endangered species fall within the zone of interest protected by the ESA." (*Id.*)

Finding the purposes of the ESA to be singularly aimed at species preservation, the Ninth Circuit also concluded that potential plaintiffs with economic or recreational claims *could not* satisfy the requisites of prudential standing. (*Id.* at 12-13) Indeed, the fact that petitioners sought to raise a competing interest in water from the affected reservoirs was enough, in the Ninth Circuit's view, to deprive them of standing to challenge the Government's determination of the amount of water necessary for the two protected species. (*Id.* at 16) Moreover, the fact that Congress had specifically directed the Government to consider economic factors in making the kinds of determinations challenged by the petitioners did not cause the Ninth Circuit to alter its views on standing. According to the Court, Congress did not, by including such factors "intend impliedly to confer standing on every plaintiff who could conceivably claim that the failure to consider one of those factors adversely affected him." (*Id.* at 17)

Thus, on August 24, 1995, the Ninth Circuit affirmed the Judgment of the District Court. Following the denial of their Suggestion for Rehearing En Banc (treated by the Ninth Circuit as a Petition for Rehearing) (See App. to Res. Reply to Pet., p. 1(a)) petitioners filed a Petition for Writ of Certiorari, which was granted on March 25, 1996.

SUMMARY OF ARGUMENT

1. The Ninth Circuit Court of Appeals erred in holding that a zone of interest test applies to claims brought pursuant to the citizen suit provision of the Endangered Species Act. Even if the petitioners would otherwise be barred by the rules of prudential standing, the decisions of this Court recognize that Congress may expand standing to the full extent permitted by Article III of the Constitution. By authorizing "any person" to commence a civil action to enjoin the United States from violating the ESA, Congress did just that - it acted to abrogate any prudential limitations that might otherwise apply to citizen suits brought under the Act. The irreducible, core components of Article III standing nevertheless remain to ensure that real "cases" or "controversies" will be brought to the courts.

2. Even if it is concluded that a zone of interest test applies to cases brought pursuant to the citizen suit provision of the ESA, the Ninth Circuit erred in barring all potential plaintiffs under the ESA except those "who allege an interest in the preservation of endangered species." Since its inception in *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970) and *Barlow v. Collins*, 397 U.S. 159 (1970), the prudential standing test has been characterized as requiring an evaluation of whether the interest sought to be protected by the complaint is arguably within the zone of interest to be protected *or regulated* by the statute in question. Regardless of whether the interests sought to be protected by petitioners are within the zone of interest *protected* by the

ESA, they are certainly within the zone of interest *regulated* by the Act and thus satisfy the prudential enquiry – assuming that it applies.

3. Should it be concluded, however, that the only relevant consideration for purposes of prudential standing is the zone of interest *protected* by the statute in question, the Ninth Circuit again erred in reading the ESA as a single-purpose statute whose protective net is so narrow that it excludes everyone except those asserting an interest in the preservation of endangered species. Through a series of amendments, Congress has acted to broaden the range of interests cognizable under the ESA to encompass the claims raised by the petitioners in the present case:

(a) In 1978, Congress amended Section 4 of the ESA to add language obligating the Secretary of the Interior to weigh and balance the economic impact of specifying any particular area as critical habitat. (ESA, Section 4(b)(2); 16 U.S.C. § 1533(b)(2)) The legislative history indicates the amendment was made for the purpose of broadening the focus of the ESA to accommodate economic-based interests. Precisely such interests were raised by the petitioners' complaint which alleges a determination of critical habitat without *any* consideration of economic impacts.

(b) In 1979, Congress amended Section 7 of the ESA to add language obligating the Secretary of the Interior to base biological opinions on the "best scientific and commercial data available." The legislative history and subsequent case law show that the amendatory language was designed to require the Secretary to

develop biological opinions based upon credible evidence, not conjecture. Potential plaintiffs in the regulated community, such as the petitioners, have a strong interest in assuring that biological opinions are based on the best evidence available. Under the Ninth Circuit's holding, however, such plaintiffs are barred from presenting claims that biological opinions are based on speculation rather than science.

(c) In 1978, Congress also amended Section 7 of the ESA to require that any alternatives suggested by the USFWS in a biological opinion be "reasonable" as well as "prudent." (ESA, Section 7(b)(3)(A); 16 U.S.C. § 1536(b)(3)(A))⁷ Reference to the legislative history of the Act shows that this choice of wording was deliberate and was intended to ensure that "community impacts," "economic feasibility" and "other relevant factors" are taken into account when biological opinions are developed. Realistically, the

⁷ Section 7(b)(3)(A) of the Endangered Species Act provides:

"Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a) of this section, the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those *reasonable and prudent alternatives* which he believes would not violate subsection (a)(2) of this section and can be taken by the Federal agency or applicant in implementing the agency action." (16 U.S.C. § 1536(b)(3)(A)) (emphasis added)

only persons with an interest in seeing that the reasonableness obligation imposed by Congress is carried out are those, like petitioners, who assert an economic interest in the activity which is the subject of the biological opinion.

(d) Congress also amended the ESA in 1982 to add a declaration of policy that federal agencies "shall" cooperate with state and local agencies to resolve water resource issues "in concert" with the conservation of endangered species. (ESA, Section 2(c)(2); 16 U.S.C. § 1531(c)(2))⁸ With respect to the matter of "water resource issues," Congress thus granted state and local water resource agencies an interest in obtaining federal cooperation in resolving endangered species conservation issues agreeably with water resource management concerns. Such agencies include petitioners Langell Valley Irrigation District and Horsefly Irrigation District,⁹ each of which has an interest protectable under the express terms of Section 2(c)(2) of the ESA itself.

⁸ Section 2(c)(2) of the ESA (16 U.S.C. § 1531(c)(2)) provides:

"It is further declared to be the policy of Congress that federal agencies shall cooperate with state and local agencies to resolve water resource issues in concert with conservation of endangered species."

⁹ Petitioners Horsefly Irrigation District and Langell Valley Irrigation District are each alleged to be a political subdivision of the State of Oregon. (App. to Pet., p. 34)

4. Although the Ninth Circuit found that Article III standing was not the issue presented by this litigation,¹⁰ respondents have nonetheless attempted to raise constitutional standing claims outside the scope of the issues presented by the Petition for Writ of Certiorari. (Br. for Res. in Opp. to Pet., pp. 9-11) Anticipating that this effort may continue as the case moves forward, the petitioners believe it is appropriate for the Court to consider the following:

(a) First, with respect to Article III standing, it is significant that this case was decided at the trial court level by way of a motion to dismiss. (App. to Pet., p. 28) At the pleading stage, unlike the summary judgment stage or at trial, the burden of establishing constitutional standing is a modest one. Here, that burden was more than adequately met by petitioners' complaint. Not only have petitioners alleged a specific injury-in-fact based upon reduced irrigation water deliveries to themselves, but they assert far more than a generally available grievance since the rights they claim have been infringed are based upon contracts held with the federal government.

(b) In addition, respondents' argument that Article III causation and redressability are lacking since a biological opinion can be readily ignored by agencies such as the Bureau, is

¹⁰ According to the Ninth Circuit:

"The issue before us is not whether the plaintiffs have satisfied the constitutional standing requirements but whether their action is precluded by the zone of interests test, the prudential standing limitation." (63 F.3d 915, 917)

incompatible with the structure of the ESA itself. Not only is the Bureau's discretion circumscribed by regulations which prevent biological opinions from being ignored, it is subject, ultimately, to the risk that the standards of the ESA will not have been met. Considering that the protection afforded by an incidental take statement – such as the take statement incorporated by the USFWS in its biological opinion for the Klamath Project – exists only if there is compliance with the recommended Reasonable and Prudent Alternative, deviation from the biological opinion is not a matter of bureaucratic whim. The civil and criminal penalties for unauthorized take of a listed species are substantial and apply to the Bureau and its employees just as they do to other "persons." In short, there is no basis for assuming – as respondents do – that a change in the biological opinion issued for the Klamath Project will not result in a change in the Bureau's operation of the Project.

5. Finally, respondents' additional contention that a "flawed" biological opinion is unreviewable under the ESA and that overregulation is not actionable so long as it is done in the name of species preservation (Br. for Res. in Opp. to Pet., pp. 11-13), is wholly lacking in merit. If a biological opinion is flawed because it was developed in violation of one or more provisions of the ESA, it is enjoined under Section 11(g)(1). The related notion that ESA overregulation is exempt from challenge so long as it is done for virtuous reasons is not only incompatible with prior decisions of this Court that establish a presumption of reviewability, it is also incompatible with the rule of

law. Like everyone else, the USFWS is required to operate within the confines of the ESA.

ARGUMENT

I. BY DRAFTING THE CITIZEN SUIT PROVISION OF THE ENDANGERED SPECIES ACT BROADLY TO ENCOMPASS "ANY PERSON," CONGRESS EXPANDED STANDING TO THE FULL EXTENT PERMITTED BY ARTICLE III OF THE CONSTITUTION

The decisions of this Court recognize that while standing includes a "core component" which consists of certain "irreducible constitutional minimum" elements that must be met by any plaintiff,¹¹ it also incorporates certain prudential considerations that may be removed by congressional grant of an express right of action. (*Gollust v. Mendell*, 501 U.S. 115, 126 (1991); *Havens Realty Corp. v.*

¹¹ As explained in *Lujan, supra*, the constitutional minima consist of the following:

"First, the plaintiff must have suffered an 'injury in fact' – an invasion of a legally-protected interest which is (a) concrete and particularized and (b) 'actual or imminent, not "conjectural" or "hypothetical." ' Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.' Third, it must be 'likely' as opposed to merely 'speculative' that the injury will be 'redressed by a favorable decision.' " (504 U.S. ____; 119 L.Ed.2d 351, 364) (citations omitted)

Coleman, 455 U.S. 363, 372 (1982); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1976); *Warth v. Seldin*, 422 U.S. 490, 501 (1975))

In the companion cases of *Association of Data Processing Service Organizations v. Camp*, 397 U.S. at 153 and *Barlow v. Collins*, 397 U.S. at 164, the Court characterized the prudential considerations of the standing doctrine in terms of a "zone of interest." Writing for the Court in both of these frequently criticized cases,¹² Justice Douglas cast the zone of interest test as a rule of judicial self-restraint, not as a rule having constitutional dimension. (*Barlow* at 154) Moreover, he recognized that Congress could, if it so elected, resolve the question of a zone of interest by expanding the limits of standing to the boundaries imposed only by Article III of the Constitution. (*Data Processing* at 153-154)

Nearly a decade later, the Court elaborated upon its statement that Congress could, by legislation, "resolve the question" of prudential standing. In *Gladstone Realtors v. Village of Bellwood*, *supra*, the Court considered language in the Fair Housing Act of 1968 (42 U.S.C. §§ 3601 *et seq.*) which authorized any "person aggrieved" to commence a civil action to enforce the rights granted by the

¹² With respect to the "injury-in-fact" concept developed in the cases, one commentator states, "More damage to the intellectual structure of the law of standing can be traced to *Data Processing* than to any other single decision." (Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 229 (1988)). Another has characterized *Data Processing* as "a remarkably sloppy opinion." (Sunstein, *What's Standing After Lujan? of Citizen Suits, 'Injuries' and Article III*, 91 Mich. L.R. 163, 185 (1992)). While a third considers it an "unredeemed disaster." (Stewart, *Standing for Solidarity*, 88 Yale L.J. 1559, 1569 (1979) (book review)).

Act. Concluding that Congress had intended to grant standing "as broad as is permitted by Article III of the Constitution" (441 U.S. at 109 (quoting *Trafficante v. Met. Life Ins. Co.*, 409 U.S. 205 at 209 (1972))) the Court recognized that Congress could, by legislation, "expand standing to the full extent permitted by Article III, thus permitting litigation by one 'who otherwise would be barred by prudential standing rules.'" (441 U.S. at 100) (citations omitted)

In the citizen suit provision of the Endangered Species Act, Congress chose authorizing language even broader than that interpreted by the court in *Gladstone Realtors*. Indeed, by authorizing "any person" to enjoin "any person" (including the United States and any other governmental instrumentality or agency) alleged to be in violation of "any provision" of the Act (§ 11(g)(1)(A)) or to commence suit against the Secretary of the Interior for failure to perform a non-discretionary duty under the Act (§ 11(g)(1)(C)), Congress used the broadest language possible. To confirm its intent to provide access to the courts in a wide range of circumstances, Congress defined the term "person" inclusively:

"The term 'person' means an individual, corporation, partnership, trust, association, or any other private entity, or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State or political subdivision thereof, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States." (ESA § 3(13); 16 U.S.C. § 1532(13))

When they are applied to this case, the foregoing provisions indicate that Congress expressly authorized suit by "individual(s)" and "political subdivision(s) of a State" against "the Secretary" for violating a non-discretionary duty or against "any officer, employee, agent, department, or instrumentality of the Federal Government" for violating "any provision" of the Act. (ESA §§ 3(13), 11(g)(1)(A), (C); 16 U.S.C. §§ 1532(13), 1540(g)(1)(A), (C)) Congress further provided that the district courts "shall" have jurisdiction over such suits (§ 11(g)(1); 16 U.S.C. § 1540(g)(1)) and that venue is appropriate in any judicial district in which the violation occurs. (ESA § 11(g)(3)(A); 16 U.S.C. § 1540(g)(3)(A)) In short, by defining the permissible plaintiffs, the permissible defendants and the permissible claims as broadly as possible, and by providing explicitly for district court jurisdiction and venue, Congress acted to abrogate any "zone of interest" requirement that might otherwise apply.

Congress' purpose in this regard is confirmed by the legislative history of the Endangered Species Act of 1973. Commenting upon H.R. 37, which contained the citizen suit language eventually enacted into law, the House Committee on Merchant Marine and Fisheries described the intended purpose of the citizen suit language in the following terms:

"This subsection authorizes citizen action to enforce the provisions of the Act. It allows any person, including a Federal official, to seek remedies involving injunctive relief for violations or potential violations of the Act. The language is parallel to that contained in the recent

Marine Protection, Research and Sanctuaries Act of 1972, and is to be interpreted in the same fashion." (H.Rep. No. 93-412, pp. 18-19 (1973)) (emphasis added)

The Committee's reference to the Marine Protection, Research and Sanctuaries Act ("MPRSA") (33 U.S.C. §§ 1401 *et seq.*) is instructive. In *Middlesex City Sewerage Auth. v. Nat. Sea Clammers* 453 U.S. 1 (1981) the Court read the citizen suit provision of the MPRSA similarly to the citizen suit provision of the Federal Water Pollution Control Act. In doing so, the Court held that Congress' purpose was to "allow suits by all persons possessing standing under this Court's decision in *Sierra Club v. Morton* 405 U.S. 727 (1972)" (453 U.S. 1, 17) – a group which the Court defined broadly to include "persons like respondents who assert that they have suffered tangible economic injuries because of statutory violations." (*Id.*) Since the Court's opinion in *Sierra Club v. Morton* defined the constitutional requirement for "injury-in-fact" as set forth in Article III of the Constitution (405 U.S. 727, 739-746), and made no mention of any "zone of interest," it is reasonable to assume that Congress intended to expand standing to the limits of Article III where it enacted the citizen suit provision of the ESA.

Importantly, however, Congress did not attempt, through the ESA's citizen suit language, to open the courthouse doors so widely that *anyone* can file suit in federal court to challenge the failure of federal agencies to comply with the law. (See *Lujan v. Defenders of Wildlife*, 504 U.S. ____; 119 L.Ed.2d at 371) While Congress could, perhaps, have added language to the citizen suit provisions of the ESA "to define injuries and articulate chains

of causation" that meet the requirements of Article III (*id.*; 504 U.S. ____; 119 L.Ed.2d at 377) (Kennedy, J., concurring) it did not do so. Accordingly, while no zone of interest test exists to bar suits under the ESA on prudential grounds; as recognized in *Gladstone*, *supra*, any potential plaintiff under the ESA must satisfy the requirements of Article III. As explained *infra*, the petitioners in the present case amply meet these requirements.

In *Defenders of Wildlife v. Hodel*, 851 F.2d 1035 (8th Cir. 1988), *opinion after remand*, 911 F.2d 117 (1990), *rev'd on other grounds sub.nom.*, *Lujan v. Defenders of Wildlife*, 504 U.S. ___, 119 L.Ed.2d 351, the Eighth Circuit relied upon *Gladstone Realtors* when it considered whether prudential limitations apply to citizen suits commenced under the ESA. It concluded that Congress' use of the term "any person" abrogated such limitations. (851 F.2d 1035, 1039)¹³

¹³ Faced with similarly broad statutory authorizations for suit, a variety of lower courts have found a congressional intent to abrogate prudential standing limitations. These cases include *Swan View Coalition v. Turner*, 824 F.Supp. 923, 929 (D. Mont. 1992) (prudential standing limitations do not apply to the Endangered Species Act; thus, a plaintiff suing under the citizen suit provision "need only meet the constitutional requirements for standing in order to bring their claim under the ESA"); *Family and Children's Center v. School City*, 13 F.3d 1052, 1061 (7th Cir.), *cert. denied*, 115 S.Ct. 420 (1994) [Individuals with Disabilities Education Act ("IDEA")] provision authorizing suits by "any person aggrieved" meant that litigants "need not run the gauntlet of prudential standing tests; satisfying Art. III is enough"; *Competitive Enterprise Institute v. National Highway Traffic Safety Administration*, 901 F.2d 107, 118-19 (D.C. Cir. 1990) (Energy Policy and Conservation Act ("EPCA") provision authorizing suit by "any person who may be adversely affected

When this Court reviewed the Eighth Circuit's decision, it reversed the conclusion that the plaintiffs met the standing requirements imposed by Article III. (*Lujan v. Defenders of Wildlife*, *supra*, 504 U.S. ___, 119 L.Ed.2d 351, 365-75) At the same time, however, the Court left intact the circuit court's conclusion regarding congressional abrogation of prudential standing by means of Section 11(g) of the ESA. Indeed, when the Court discussed prudential standing at all, it did so in terms which emphasized judicial self-government rather than the concept of a barrier to otherwise qualified plaintiffs:

"One of those landmarks, setting apart the 'cases' and controversies that are of the justiciable sort referred to in Article III - 'serving to identify those disputes which are appropriately resolved through the judicial process' - is the doctrine of standing. Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case - or - controversy requirement of Article III." (504 U.S. ___, 119 L.Ed.2d at 364) (citations omitted)

The Ninth Circuit's decision in the present case is contrary to the plain language of Section 11(g) of the ESA and effectively ignores the consistently expressed view of

by any rule" eliminated prudential standing limitations); *Consumers Union v. Federal Trade Commission*, 691 F.2d 575, 576 (D.C. Cir. 1982) (en banc), *aff'd* 463 U.S. 1216 (1983) (Federal Trade Commission Improvement Act provision authorizing "any interested party" to challenge the congressional veto provisions of the Act was "intended to permit standing . . . to the full extent permitted by Article III.")

this Court that Congress may expand standing under a statute to the limits of Article III of the Constitution. Although it cites *Gladstone Realtors* to that effect (App. to Pet., p. 8) it never applies *Gladstone* – or *Data Processing* or any other decision of the Court – to the citizen suit language actually adopted by Congress in the ESA. Likewise, although the Ninth Circuit acknowledges a conflict between its decision and the Eighth Circuit's decision in *Defenders of Wildlife, supra*, (App. to Pet., p. 8, n. 3) it never offers to explain why, in its view, the Eighth Circuit's decision is incorrect.¹⁴

¹⁴ The Ninth Circuit's decision did point out that the split of authority among the circuit courts of appeal includes the Circuit Court of Appeals for the District of Columbia (App. to Pet. p. 8) which has stated in dicta, in three cases, that Congress' decision to incorporate citizen suit language into the ESA did not abrogate the obligation of a plaintiff to demonstrate prudential standing. (See *State of Idaho By and Thru Idaho Public Utilities Commission v. ICC*, 35 F.3d 585, 592 (D.C. Cir. 1994); *Humane Soc. of the U.S. v. Hodel*, 840 F.2d 45 (D.C. Cir. 1988); *National Audubon Society v. Hester*, 801 F.2d 405, 407 (D.C. Cir. 1986))

It is noteworthy, however, that none of the D.C. Circuit's opinions on the issue – unlike the Eighth Circuit's opinion in *Defender's of Wildlife, supra*, – was the subject of a hearing by this Court. Nor has the D.C. Circuit attempted to use prudential standing to bar everyone except environmental plaintiffs from suit under the ESA. To the contrary if it has found, for example, that a state's proprietary interest in land satisfies the test without regard to whether the state has an interest in the preservation of endangered species. (*State of Idaho, supra*; see also, *Catron County Board of Commissioners v. United States Fish and Wildlife Service*, ___ F.3d ___, 1996 U.S. App. Lexis 1479 (10th Cir. 1996)) Indeed, the D.C. Circuit appears to have never applied prudential standing to exclude any class of plaintiffs from an ESA suit, let alone all classes of potential plaintiffs, save one.

Less than two months prior to issuance of the appellate opinion herein, this Court reached the merits of the controversy in *Babbitt v. Sweet Home Chapter of Communities*, 515 U.S. ___, 132 L.Ed.2d 597 (1995). In *Sweet Home*, "small landowners, logging companies and families dependent upon the forest products industries" asserted economic interests, not an interest in the prevention of endangered species when they challenged a regulation issued by the Secretary of the Interior to define the word "harm" used in the ESA. (515 U.S. at ___; 132 L.Ed.2d at 608) If the highly exclusionary "zone of interest" defined by the Ninth Circuit in fact exists, then this Court could never have reached the merits of the *Sweet Home* controversy.

II. EVEN IF A ZONE TEST APPLIES, PETITIONERS ARE WELL WITHIN THE ZONE OF INTERESTS REGULATED BY THE ENDANGERED SPECIES ACT

When this Court articulated a zone of interests test in *Data Processing*, it did so in terms that recognized not only a zone of interest "protected" by the statute in question, but also a zone of interest "regulated" by the relevant statute:

"The question of standing is different. It concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complaint is arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question." (397 U.S. at 153) (emphasis added)

By focusing exclusively on the purported zone of interest "protected" by the ESA and ignoring any zone of interest *regulated* under the ESA, the Ninth Circuit managed to truncate the prudential standing test in a manner incompatible with the very decision which established the test. Because they receive their primary source of irrigation water from the federal reservoirs that are regulated by the biological opinion adopted by respondents, the petitioners are without doubt, "arguably within the zone of interest . . . regulated by the statute . . . in question."

Nearly two decades after it launched the zone of interest concept, the Court used its decision in *Clarke v. Securities Industry Association*, 479 U.S. 388 (1987) to further explain how the concept should be applied. In doing so, the Court advanced an expansive view of prudential standing greatly at odds with the cramped, grudging zone of protection concept offered by the Ninth Circuit. According to *Clarke*, the "essential inquiry" is whether Congress intended for a particular class of plaintiffs to be relied upon to challenge agency disregard of the law. (*Id.* at 399) Thus, the zone of interest test acts as a "guide" in Administrative Procedure Act cases for determining whether a plaintiff should be heard and is "not meant to be especially demanding." (*Id.* at 399-400) Only if the plaintiffs' interests are "so marginally related to or inconsistent with the purposes implicit in the statute" will the suit be rejected on prudential grounds. (*Id.*)¹⁵

¹⁵ One commentator – who has since been nominated to the Ninth Circuit – has provided the following interpretation of *Clarke*:

Although the Ninth Circuit believes that *Clarke* "resuscitated" the zone of interest test,¹⁶ it never followed this Court's view that the "essential inquiry" is whether Congress intended for a particular class of plaintiffs to be relied upon to challenge agency disregard of the law. Nor did it give any apparent consideration to *Clarke's* view that a zone of interest test is "not meant to be especially demanding."

When it drafted a citizen suit provision allowing "any person" to challenge government conduct alleged to violate the ESA, Congress logically could expect that those within the zone of interest regulated by the Act could be relied upon to challenge certain types of agency disregard of the law. Indeed, if that disregard concerns

"*Clarke* provides a welcome transformation of *Data Processing's* 'arguably within the zone of interest' test. Under *Data Processing*, standing was a question of whether plaintiff was 'arguably' entitled to sue rather than whether plaintiff was actually entitled to do so. In *Clarke*, the 'arguably' language becomes a presumption in favor of standing in APA cases rather than a signal that the standing determination is only a preliminary and tentative decision about whether plaintiff is actually entitled to sue. . . ." (Fletcher, *The Structure of Standing*, *supra*, 98 Yale L.J. 221, 264) (citations omitted) (emphasis added)

¹⁶ The Ninth Circuit's view of *Clarke* is a matter of considerable debate. As already noted, one commentator has expressed the view that *Clarke* provided a "transformation" of the zone of interest test to a "presumption in favor of standing in APA cases." (Fletcher, *supra*). Another has expressed the view that, "This opinion [*Clarke*] puts the zone of interest test once again into eclipse." (Wright, Miller & Cooper *Federal Practice and Procedure: Jurisdiction* 2d § 3531.7 (1995 Supplement))

over-regulation undertaken without considering the economic balancing obligations imposed by the Act, the *only* potential plaintiffs who could be relied upon to challenge the agency are those within the zone of interest *regulated* by the Act.¹⁷ Here, petitioners' contractual-based reliance upon Clear Lake and Gerber reservoirs places them well within that zone.¹⁸

¹⁷ Certainly, the environmental plaintiffs favored by the Ninth Circuit are unlikely to have an interest in raising such a challenge; nor is it realistic to believe – as the Ninth Circuit apparently does (63 F.3d 915, 917, n. 2) – that such a challenge could be raised by a *regulated* federal agency against a federal *regulating* agency. Indeed, since the conduct of litigation in which the United States is a party is reserved to the Department of Justice (28 U.S.C. § 516) which presumably speaks with one voice, it is doubtful that such litigation could be mounted at all. Further, it is unclear to petitioners how potentially collusive litigation brought by sister agencies answerable to the same cabinet official furthers the goal of the standing doctrine in identifying those justiciable “cases” or “controversies” which are “appropriately resolved through the judicial process. . . .” (*Lujan v. Defenders of Wildlife*, *supra* 504 U.S. ____; 119 L.Ed.2d 351, 364) As has been true for a considerable period of time, in the Ninth Circuit and elsewhere, those who rely on federal projects – not the federal operator of the project – are more likely to present a real “case” or “controversy” regarding federal regulatory action.

¹⁸ The decisions of this Court strongly suggest that standing will be found to exist if government regulation affects the plaintiff's *contractual relationship* with a regulated party. For example, in *United States v. Storer Broadcasting Co.* 351 U.S. 192 (1956) the Court quoted approvingly from its decision in *Columbia Broadcasting System v. United States*, 316 U.S. 407 (1941):

“Appellant's standing to maintain the present suit in equity is unaffected by the fact that the *regulations* are not directed to appellant and do not in terms compel

In short, petitioners are within the zone of interest regulated by the ESA. Moreover, they are logically the only potential plaintiffs with an interest sufficient to see that the economic balancing requirements added to the ESA by Congress are enforced.¹⁹ Accordingly, whether it

action by it or impose a penalty upon it. . . . It is enough that, by setting controlling standards for the Commission's action, the regulations purport to operate to alter and affect adversely appellant's contractual rights and business relations with station owners whose applications for licenses the regulations will cause to be rejected and whose licenses the regulations may cause to be revoked.” (351 U.S. 192, 199) (emphasis added) (citations omitted)

Similarly, in *Cotovsky-Caplan Physical Therapy Assn. v. United States*, 507 F.2d 1363 (7th Cir. 1975), the Court per Judge (now Justice) Stevens upheld the standing of a plaintiff to challenge an HEW medicare regulation even though the regulation did not directly regulate the plaintiff. The regulation did, nonetheless, affect the plaintiff's *contractual relations* with regulated parties:

“We therefore conclude that if, pursuant to what it perceives to be its statutory authority, a government agency regulates the *contractual relationships* between a regulated party and an unregulated party, the latter as well as the former may have interests that are arguably within the regulated zone for purposes of testing standing.” (507 F.2d 1363 at 1367) (emphasis added)

¹⁹ According to the Ninth Circuit, the petitioners effectively have a “competing interest” – with the fish – in the water stored in Clear Lake and Gerber reservoirs. (63 F.3d at 921) The decisions of this Court consistently recognize that the existence of such a competitive interest is sufficient to support standing, even if a zone of interests tests is applicable. (*Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 157; *Arnold Tours, Inc. v. Camp*, 400 U.S. 45, 46 (1970); *Investment*

is the "zone of interest" analysis of *Data Processing* or the "essential inquiry" analysis of *Clarke* which is used, petitioners satisfy the requirements of prudential standing to challenge the biological opinion issued in this case.

III. THE RANGE OF INTERESTS PROTECTED BY THE ENDANGERED SPECIES ACT ENCOMPASSES THE INTERESTS ASSERTED BY PETITIONERS

Even if the focus of the zone of interest analysis is narrowed to an examination of the interests *protected* by the ESA, the allegations raised by petitioners are embraced by at least four different amendments adopted by Congress for the purpose of injecting economic rationality into the Act. Each of these provisions is directly related to the claims raised by the petitioners in this proceeding.

(a) Congress Explicitly Required a Balancing of Impacts as Part of the Designation of Critical Habitat

In 1978, Congress amended Section 4 of the ESA (16 U.S.C. § 1533) to require the Secretary to consider "the economic impact, and any other relevant impact" of specifying "any particular area" when he designates critical

Company Institute v. Camp, 400 U.S. 617, 620 (1971); *Clarke v. Securities Industry Assn.*, *supra*, 479 U.S. 388, 403; *see also*, *FCC v. Sanders*, 309 U.S. 470, 476-477 (1940))

habitat.²⁰ According to the House Report which accompanied the bill that added the balancing language (H.R. 14104, 95th Cong., 2nd Sess. (1978)) the proposal represented a compromise between disparate points of view: it attempted to retain the basic integrity of the ESA while introducing some flexibility that would permit exemptions from the Act's requirements. (H.R. Rep. No. 1625, 95th Cong., 2nd Sess., (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9463-64)).

During the debates in the House leading to adoption of H.R. 14104, Representative Leggett, the bill's author, described the purpose of the balancing requirement. He stated:

"The Endangered Species Act has been criticized because it allows for no consideration of the economic impact of listing a species or designating critical habitat. Although H.R. 14104 retains the Act's stringent mandate, it does introduce a consideration of economic impact in

²⁰ The language adopted by Congress in 1978 added the following paragraph to Section 4(b) of the ESA:

"In determining the critical habitat of any endangered or threatened species, the Secretary shall consider the economic impact, and any other relevant impacts, of specifying any particular area as critical habitat, and he may exclude any such area from the critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species. (Act of Nov. 10, 1978, Pub. L. No. 95-632, 1978 U.S.C.C.A.N. (92 Stat.) 366).

several respects. . . . [T]he bill includes a provision which requires the Secretary to evaluate the economic impact of designating critical habitat for invertebrate species. This provision authorizes the Secretary to alter the designation of critical habitat for the species if he determines that the benefits associated with excluding the habitat outweigh the benefits associated with the designation. . . . " (124 Cong. Rec. 38,134 (1978) (Statement of Rep. Leggett)).

In 1982 when Congress later reauthorized and amended the ESA (P.L. 97-304) the House Report which accompanied the amendments stated the following regarding the balancing obligation in Section 4:

"Desirous to restrict the Secretary's decision on species listing to biology alone, the [Merchant Marine and Fisheries] Committee nonetheless recognized that the critical habitat designation, with its attendant economic analysis, offers some counter-point to the listing of species without due consideration for the effects on land use and other development interests." (H.R. 567, 97th Cong., 2nd Sess. (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2812 (Merchant Marine and Fisheries Committee))

Congress thus amended the ESA for the explicit purpose of broadening its focus to accommodate economic-based interests in connection with the determination of critical habitat. Precisely such interests were raised in the complaint filed by petitioners herein. With considerable clarity they alleged a determination by the Secretary of critical habitat without *any* consideration of economic impacts, in violation of the ESA. (App. to Pet., p. 42)

The Ninth Circuit's refusal to find standing in these circumstances is inconsistent with the statements of both the author of the bill which added the economic balancing requirement to the ESA and the House Committee with jurisdiction over the Act. Of equal concern, the Ninth Circuit's decision denies standing to the only potential plaintiffs possessing a substantial interest in assuring that the habitat designation process is rational in its consideration of economic factors.

(b) Congress Amended the ESA To Require That Biological Opinions Be Based Upon Scientific and Commercial Data, Not Speculation

In 1979, Congress amended Section 7 of the ESA to require the Secretary of the Interior to prepare biological opinions based on the "best scientific and commercial data available."²¹ A review of the biological opinion at issue in this case shows that petitioners belong to the

²¹ As amended, Section 7(a)(2) reads in relevant part: Each federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical, unless such agency has been granted an exemption for such action *In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.* (Emphasis added)

class of persons Congress intended to benefit when it required the Secretary to do so.

Here, the biological opinion includes a "Reasonable and Prudent Alternative" to the long-standing operating procedures of Clear Lake and Gerber reservoirs, even though the USFWS concluded that the populations of the fish in the two reservoirs were either "sizeable" or existing in "good numbers." (Jt.App. p. 54) It imposes surface level restrictions at both reservoirs without pointing to scientific or commercial data indicating that previously existing reservoir operating procedures were incompatible with the well-being of the fish or that the reservoir level restrictions made a part of the opinion's Reasonable and Prudent Alternative would improve their condition. (Jt.App. pp. 88-92) In short, the biological opinion is based on speculation, not science, because it simply assumes without *any* supporting scientific or commercial data, that reservoir restrictions are necessary to protect fish populations already found to be doing just fine.²²

²² Very recently, in the case *Mausolf v. Babbitt*, 913 F. Supp. 1334, (D. Minn. 1996), the United States District Court overturned another biological opinion issued by the USFWS on similar grounds:

"The Court finds that the agency's conclusion that these lakeshore closures are reasonably necessary to prevent incidental takings of Voyageurs wolves and bald eagles is based on little more than speculation. In the end, the FWS and the NPS (National Park Service) simply contend that temporary displacements of these species may evolve into permanent displacements if snowmobilers are allowed continued access to the lakeshore trails. There is absolutely no evidence in the record to support this proposition.

This is precisely the type of violation of the ESA Congress intended to subject to judicial review.²³

Petitioners brought themselves squarely within the zone of interests protected by Section 7(a) of the Act when they claimed that the Secretary did not impose minimum reservoir level restrictions based on the best scientific and commercial data available. (App. to Pet. pp. 38-39) It is the kind of claim which persons having an economic interest in the reservoir's water would be most likely to raise. Under the Ninth Circuit's holding, however, this is the type of claim that, in future, will not be heard on the merits.

The conference report of the 1979 amendments which imposed the obligation to use the "best scientific and commercial data" on the Secretary explained that the

Indeed, the only record evidence is to the contrary . . . " (913 F.Supp. 1334, 1344)

²³ Indeed, in *Pacific Legal Foundation v. Andrus*, 657 F.2d 829, 836, (6th Cir. 1981), the Court of Appeals said as much when it dismissed the appellant's claim that an environmental impact statement under the National Environmental Policy Act, 42 U.S.C.A. §§ 4321 *et seq.* is required before a species is listed as endangered or threatened under the ESA:

Appellants suggest that the impact statement would have indicated that several of the mussels had not been seen in years in the Duck River. Perhaps so, but the best scientific data on the existence and whereabouts of the species which the Secretary must consider under the ESA should already have indicated that fact. *If the Secretary has not relied upon the best data available, the solution would be judicial review of the rulemaking, not collateral attack to require an impact statement.*

term was intended to assure that species protection would be based upon credible scientific and commercial information:

"The amendment will permit the wildlife agencies to frame their Section 7(b) opinions on the best evidence that is available or can be developed during consultation. If the biological opinion is rendered on the basis of inadequate information then the Federal agency has a continuing obligation to make a reasonable effort to develop that information." (H.R. Conf. Rep. No. 96-697, 96th Cong., 1st Sess. 12, reprinted in 1979 U.S.C.C.A.N. 2572, 2576)²⁴

Thus, although incomplete information can form the basis of a biological opinion, mere speculation will not suffice. (*Greenpeace Action v. Franklin* 14 F.3d 1324, 1336 (9th Cir. 1992); see, also, *Babbitt v. Sweet Home Chapter of*

²⁴ Congressman Bowen, who co-sponsored the Endangered Species Act Amendments of 1979, made the following comment before the Committee of the Whole House on the State of the Union regarding the quality of information upon which the Secretary had previously relied:

There have been problems [with the ESA]. We are all aware of them. The General Accounting Office has documented some serious management deficiencies. The failure to prioritize listing and recovery actions, inadequate attention to delisting or reclassifying species, and the failure to utilize the best scientific data available. I believe that the Department of the Interior has already made real progress in addressing these deficiencies. The amendments that I intend to offer to the bill will make sure that the Department does correct those portions of the program criticized by the GAO. (125 Cong. Rec. 29050 (1979) (Statement of Rep. Bowen))

Communities, supra, 515 U.S. ___, 132 L.Ed.2d 597, 620 (O'Connor, J., concurring) (discussing the definition of "harm" and stating that "the regulation clearly rejects speculative or conjectural effects.")) As the Ninth Circuit itself previously held, incomplete information does not absolve the Secretary of the statutory requirement to prepare a comprehensive biological opinion. (*Connor v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988). Moreover, a biological opinion must be "premised . . . on a reasonable evaluation of available data, not on pure speculation." (*Greenpeace, supra* at 1337 (emphasis added)) Thus, even though the best available information may be incomplete, a biological opinion that does not reasonably evaluate this information but, instead, simply draws a speculative conclusion, violates the Act.

(c) Congress Amended the ESA to Require Consideration of Economic Feasibility in the Development of Biological Opinions

In 1978, Congress amended the ESA by enacting the consultation procedures which resulted in the biological opinion at issue in this case.²⁵ More specifically, Congress amended the Act to require that "reasonable and prudent alternatives" be developed by the Secretary in the event a project, as proposed, is found to cause jeopardy to a listed

²⁵ Congress' purpose in doing so was to introduce flexibility into the Act. (See e.g., H.R. Rep. No 1625, 95th Cong., 2nd Sess., at 3 (1978); 124 Cong. Rec. 9804 (1978) (Statement of Sen. Baker); 124 Cong. Rec. 21,135 (1978) (Statement of Sen. Randolph); 124 Cong. Rec. 21,139 (1978) (Statement of Sen. Scott)).

species. (ESA § 7(b)(3)(A); 16 U.S.C. § 1536(b)(3)(A)). While this requirement was added for the specific purpose of compelling the Secretary to consider economic feasibility, community impacts and other relevant factors in the course of developing biological opinions, the opinion developed for the Klamath Project provides no indication that *any* economic-based inquiry was undertaken when restrictions were imposed upon the release of irrigation water from Clear Lake and Gerber reservoirs.

Reference to the legislative history of the 1978 amendments of the ESA discloses that the phrase "reasonable and prudent alternatives" was defined during debate on S. 2899, 95th Cong., 2nd Sess. (1978), which contained the amendatory language ultimately adopted by Congress. During a colloquy concerning the meaning of the phrase "reasonable and prudent alternatives," Senator Howard Baker – without dissent – stated the following:

"It is the intent of the Environment and Public Works Committee that the cabinet-level panel established by S. 2899 [the Endangered Species Committee] in evaluating alternatives examine not only engineering 'feasibility,' but also environmental and *community impacts, economic feasibility and other relevant factors*. In other words, the Environment and Public Works Committee believes that the use of the term 'reasonable' rather than 'feasible' gives more flexibility to the Endangered Species Committee in its review of 'irresolvable' conflicts arising under the Endangered Species Act." (124 Cong. Rec. 21,590 (1978))

Senator Baker's position as one of the chief sponsors of the so-called "Culver-Baker Amendments" which comprised S. 2899, is important. (See, e.g., *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-527 (1982) ('remarks of the sponsor of language ultimately enacted are an authoritative guide to the statute's construction'); *Weinberger v. Rosst*, 456 U.S. 25, 35 (1982) (sponsor's statements entitled to weight))

Of at least equal significance is the fact that respondents, themselves, have interpreted the ESA to require that the "reasonable and prudent alternatives" which lie at the heart of any biological opinion that makes a jeopardy finding, must be "economically feasible." In Joint Regulations adopted by the United States Fish and Wildlife Service and the Marine Fisheries Service for the purpose of administering the ESA, the agencies define "reasonable and prudent alternatives" as follows:

"Reasonable and prudent alternatives refer to alternative actions during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistently within the scope of the federal agency's legal authority and jurisdiction, that are economically and technically feasible, and that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat." (50 C.F.R. § 402.02, emphasis added)

In short, both Congress and the agencies charged with implementation of the ESA recognized that development of the kind of "reasonable and prudent alternative" which lies at the heart of the present case must be guided

by the concept of "economic feasibility." The Ninth Circuit's decision, however, denies standing to the only group of potential plaintiffs who could be relied upon to challenge agency disregard of the "economic feasibility" requirement.

(d) Congress Explicitly Required Federal Agencies to Cooperate With State and Local Agencies to Resolve Water Resources Issues in Concert With the Conservation of Endangered Species

Finally, in 1982, Congress amended Section 1 of the ESA to amplify its "Policy" regarding the conservation of endangered species. As amended, Section 1(c) of the Act (16 U.S.C. § 1531(c)) now provides, in relevant part:

"(2) It is further declared to be the policy of Congress that federal agencies shall cooperate with state and local agencies to resolve water resource issues in concert [²⁶] with conservation of endangered species."

Thus, with respect to the singular matter of "water resource issues," Congress granted state and local water resource agencies an interest in obtaining federal cooperation in resolving endangered species conservation issues

²⁶ In *Jeffers v. United States*, 432 U.S. 137, 148-49 (1977), this Court defined the words "in concert" in the following terms:

"In the absence of any indication from the legislative history or elsewhere to the contrary, the . . . likely explanation is that Congress intended the word 'concert' to have its common meaning of agreement in a design or plan."

agreeably with water resource management concerns. Such agencies – and appellants Horsefly Irrigation District and Langell Valley Irrigation District are each alleged to be a subdivision of the State of Oregon (App. to Pet., pp. 33-34) – have a unique interest that is protectable under the terms of the ESA itself.

IV. THE ALLEGATIONS OF PETITIONERS' COMPLAINT SATISFY THE IRREDUCIBLE MINIMUM STANDING ELEMENTS ESTABLISHED BY ARTICLE III OF THE CONSTITUTION

In their opposition to the Petition for Writ of Certiorari, respondents have asserted an Article III standing argument (Br. for Res. in Opp. to Pet., pp. 9-11) that is outside the scope of the issues raised in the Petition and that was never decided by either the District Court (see App. to Pet., p. 27) or the Ninth Circuit. Indeed, the Ninth Circuit did *not* perceive Article III standing to be the issue before it:

"The issue before us is not whether the plaintiffs have satisfied the constitutional requirements but whether this action is precluded by the zone of interests test, the prudential standing limitation that the district court deemed dispositive." (63 Fd.3d 915, 917)

Considering the procedural context within which the present case reached the Ninth Circuit, the appellate court's focus upon prudential standing limitations, rather than Article III requirements, was appropriate. This litigation was disposed of at the pleading stage on a motion to dismiss. (App. to Pet., p. 28) In these circumstances, the burden of establishing Article III standing is a modest

one. (See *National Organization of Women v. Scheidler*, 510 U.S. ___, 127 L.Ed.2d 99, 107 (1994); *Lujan v. Defenders of Wildlife*, *supra*, 504 U.S. ___, 119 L.Ed.2d 351, 364; *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990); *United States v. SCRAP*, 412 U.S. 669, 688-90 (1973) (extended chain of causation sufficient to show injury at pleading stage))

Here, the modest burden of demonstrating Article III standing is more than adequately carried. Petitioners allege injury to contract-based water entitlements resulting from reduced quantities of irrigation water otherwise available to them (App. to Pet. pp. 34, 40) thus raising far more than a generalized grievance common to all members of the public. (*Lujan v. Defenders of Wildlife*, *supra*, 504 U.S. ___, 119 L.Ed.2d 351, 372-375) They also allege that their injury is *caused* by the restrictions on lake levels found in respondents' biological opinion. (App. to Pet., pp. 34, 40) Further, redressability is satisfied because petitioners seek relief which will set aside the biological opinion and enjoin respondents from failing to comply with Sections 4 and 7 of the ESA (*id.* at 44), thus restoring them to the priority for Klamath Project water which they otherwise had under their contracts.

In the face of these allegations, respondents have resorted to the argument that petitioners' injury is not "fairly traceable to the challenged action;" but, instead, is the result of the "independent action of some third party not before the Court." (Br. in Opp. to Pet., p. 10) Reduced to the essentials, respondents' would have the Court pretend there is no connection between the biological opinion issued by the USFWS and re-operation of the Klamath Project by the Bureau - even though it was alleged that

the Bureau would comply with the precise terms of the biological opinion. (App. to Pet., p. 32) This suggested suspension of belief is grounded upon respondents' apparent assumption that the Bureau is free to ignore the reasonable and prudent alternatives suggested by the USFWS. (Br. in Opp. to Pet., p. 10) The assumption is fundamentally flawed, however, since it attempts to treat the biological opinion as a meaningless piece of paper and is incompatible with the ESA and its implementing regulations.

The basic, substantive obligation of federal agencies under the ESA is created by Section 7(a)(2) of the Act (16 U.S.C. § 1536(a)(2)) which provides in relevant part that each federal agency "shall" insure that any action it carries out is not likely to jeopardize the continued existence of any threatened or endangered species or result in the destruction or adverse modification of critical habitat. To this end, regulations adopted by the Secretary to implement the ESA require that once a biological opinion is issued, the Bureau must determine whether and in what manner to proceed in light of the opinion and to notify the FWS of its final decision regarding the proposed action. (50 C.F.R. § 402.15(b))²⁷

While the Bureau (or the Secretary) may depart from a biological opinion, it may do so only if "alternative, reasonably adequate steps to insure the continued existence of any threatened or endangered species" are

²⁷ 50 C.F.R. § 402.15(b) provides:

"If a jeopardy biological opinion is issued, the federal agency shall notify the Service of its final decision on the action."

adopted. (*Tribal Village of Akutan v. Hodel*, 869 F.2d 1185, 1193 (9th Cir. 1988)) Furthermore, if the Secretary (or Bureau) deviates from the biological opinion, he does so "subject to the risk that he has not satisfied the standard of Section 7(a)(2)." (*Tribal Village of Akutan v. Hodel*, *supra*; *Westlands Water Dist. v. U.S. Dept. of Interior*, 850 F.Supp. 1388, 1421 (E.D. Cal. 1994))

Considering the substantial civil and criminal penalties which Congress has provided for non-compliance with the take provisions of the Act (16 U.S.C. § 1540(a), (b)), deviation from a biological opinion is not simply a matter of bureaucratic whim. Where, as here, a biological opinion includes a statement authorizing the take of species incidental to the operation of the project (see Jt.App., pp. 92-96), the authorization – and related immunity from civil or criminal liability – is valid *only* if there is compliance with the reasonable and prudent alternatives and measures prescribed by the USFWS. (See 16 U.S.C. §§ 1536(b)(4), 1536(o)(2); 50 C.F.R. §§ 402.14(i)(1)(iv), 402.14(i)(5)) Hence, in order to avoid potential criminal liability for an illegal "take" of endangered species, the Bureau *had* to modify its operation of the Klamath Project to conform to the biological opinion. It is thus incorrect to suggest that the biological opinion had no discernible impact on Klamath Project operations and that the causation and redressability elements of Article III standing are lacking.

Moreover, as this Court also recognized in *Lujan v. Defenders of Wildlife*, *supra*, where the plaintiff himself is an object of the challenged action at issue, there is ordinarily little question that the action caused the injury and that a judgment preventing the action will redress it. (504

U.S. at 119 L.Ed.2d at 365) Here, the record shows that the regulation of irrigation releases from the reservoirs utilized by petitioners is a principal object of the biological opinion. *Inter alia*, the opinion states that irrigated agriculture has reduced the quantity and quality of habitat available for suckers (Jt.App., p. 38); that Gerber Reservoir reached critically low levels in the two years preceding the opinion because of releases of water for irrigation (*id.*, 56); and that irrigation releases in drought years will reduce reservoir surface area and hence cause a loss of habitat in Clear Lake Reservoir (*id.*, p. 68).

Perhaps not surprisingly in view of the foregoing determinations, the Reasonable and Prudent Alternative developed by the USFWS makes the reduction of "water deliveries" from the reservoirs one of its main objects. Thus, it prohibits "water deliveries" from Gerber Reservoir when surface elevations are 4799.6 feet or less. (Jt.App., p. 90) It also requires a minimum surface elevation in Clear Lake Reservoir of 4523.0 feet and bars "water deliveries" from the reservoir when surface elevations are 4521.0 feet or less. (*Id.*, pp. 88-89) In these circumstances, there is little question that, by virtue of their diversion and use of irrigation water from Clear Lake and Gerber reservoirs, petitioners are an object of the biological opinion at issue.

V. RESPONDENTS ENJOY NO IMMUNITY FROM COURT REVIEW IF THEY ISSUE A FLAWED BIOLOGICAL OPINION OR OVER-REGULATE IN THE NAME OF SPECIES PRESERVATION

Respondents have also argued they may issue a "flawed biological opinion" and over-regulate in the

name of species protection without the threat of court review. (Br. for Res. in Opp. to Pet., pp. 11-14) Not only does this assertion run counter to the presumed reviewability of administrative action repeatedly enunciated by this Court; it makes a mockery of Congress' intent to *encourage* the judicial review of ESA decisions by extending the use of the citizen suit to "any person."

In *Barlow v. Collins*, *supra*, 397 U.S. 136 the Court broadly expressed its view that the preclusion of judicial review of administrative action is not to be lightly inferred. (*Id.* at 166) Rather, judicial review of such action "is the rule," while nonreviewability is "an exception which must be demonstrated." (*Id.*; see also *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221, 230, n. 4 (1986); *Block v. Community Nutrition Institute*, 467 U.S. 340, 345 (1984); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971))

Here, it can hardly be said that the Endangered Species Act evidences a legislative intention to preclude judicial review. To the contrary, the citizen suit provision of the Act forcefully expresses Congress' intentions with respect to judicial review when it authorizes the commencement of a civil suit by "any person" to enjoin the conduct of "any person, including the United States and any other governmental . . . agency" alleged to be in violation of "any provision" of the Act or regulation issued thereunder. (16 U.S.C. § 1540(g)(1)(A)) A clearer, broader authorization of judicial review would be difficult to create.

Moreover, the present case is not the first time respondents have advanced their argument that ESA

over-regulation is immune from review. Earlier this year the same argument was advanced in the case of *Mausolf v. Babbitt*, 913 F.Supp. 1334 (D. Minn. 1996). It provoked the following response from the district court:

"The Court is unwilling to adopt the view that the FWS is unrestrained if it cloaks any of its acts in the laudable robe of endangered and threatened species protection. This is a form of totalitarian virtue – a concept for which no precedent has been advanced and which is foreign to the rule of law." (*Id.* at 1342)

Respondents' assertion of ESA immunity for virtuous over-regulation also runs counter to the observation in *Babbitt v. Sweet Home Chapter of Communities*, *supra*, 515 U.S. ___, 132 L.Ed.2d 597 that,

"One can doubtless imagine questionable applications of the regulations [defining the word 'harm' used in § 3(19) of the ESA (16 U.S.C. § 1532(19))] that test the limits of the agency's authority." (515 U.S. ___, 132 L.Ed.2d 597, 621 (O'Connor, J., concurring))

The position that there are no limits to USFWS over-regulation under the ESA – so long as the over-regulation occurs in the name of species protection – is an unprecedented assertion of federal regulatory authority. It is also a concept, "foreign to the rule of law." (*Mausolf* at 1342) However, unless potential plaintiffs such as the petitioners are found to have standing to sue, it is unclear how the citizen suit provision of the ESA could ever be used to prevent over-regulation involving activities such as the designation of critical habitat without regard to economic impact; the issuance of biological opinions whose findings

and conclusions extend beyond available scientific data or the development of "reasonable and prudent alternatives" that ignore economic feasibility and community impacts. Indeed, if the Ninth Circuit was correct in holding that citizen suits are available *only* to those who allege an interest in species preservation, such suits are likely to result in skewed enforcement of the ESA which actually *encourages* governmental over-regulation.

VI. CONCLUSION

For the foregoing reasons, the Ninth Circuit erred when it determined that citizen suits under the Endangered Species Act are subject to a narrow zone of interest test. By authorizing "any person" to challenge government conduct alleged to violate the Act, Congress acted to expand standing to the full extent permitted by Article III. Moreover, if a zone of interest test applies notwithstanding the citizen suit language utilized by Congress, such a test was satisfied by the petitioners herein. Accordingly, for the reasons set forth above, the decision of the Ninth Circuit Court of Appeals should be reversed.

DATED: May 23, 1996

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1995

BRAD BENNETT, ET AL., PETITIONERS

v.

MICHAEL SPEAR, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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6-18-96

QUESTIONS PRESENTED

Petitioners, two ranchers and two water irrigation districts, brought the present action challenging a biological opinion issued by the U.S. Fish and Wildlife Service, pursuant to Section 7 of the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1536, on the effects of the Bureau of Reclamation's long-term operation of the Klamath Irrigation Project on two endangered species of fish. The questions presented are as follows:

1. Whether petitioners have standing under Article III of the Constitution.
2. Whether petitioners' challenge to the biological opinion is cognizable under either the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, or the citizen suit provision of the ESA, 16 U.S.C. 1540(g).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Summary of argument	11
Argument	14
I. The allegations of petitioners' complaint fail to satisfy the requirements for standing under Article III of the Constitution	17
A. Petitioners have failed to allege facts which, if taken as true, would demonstrate that they have suffered injury in fact	19
B. Any injury suffered by petitioners is not fairly traceable to the FWS's issuance of the biological opinion	20
C. Any injury suffered by petitioners is not redressable by a favorable judicial ruling	26
II. Even if petitioners met the requirements of Article III, their suit could not go forward, because their claims are not cognizable under either the Administrative Procedure Act or the ESA citizen suit provision	30
A. Petitioners' suit cannot proceed under the Administrative Procedure Act because the issuance of a biological opinion is not a reviewable "final agency action"	30
B. The citizen suit provision of the Endangered Species Act provides no basis for adjudication of petitioners' suit	35
1. The Service's issuance of the biological opinion in this case did not constitute a failure to perform a nondiscretionary duty under 16 U.S.C. 1533	37

IV

Argument—Continued:	Page
2. Issuance of an inadequate or erroneous biological opinion would not place the Secretary "in violation of" the ESA or implementing regulations	38
C. Alternative avenues exist by which a court may review claims that the Service has recommended unreasonably severe restrictions on the use of natural resources	46
Conclusion	50
Appendix	1a

TABLE OF AUTHORITIES

Cases:

<i>ASARCO, Inc. v. Kadish</i> , 490 U.S. 605 (1989)	27
<i>Abbott Laboratories v. Gardner</i> , 387 U.S. 136 (1967)	34
<i>Allen v. Wright</i> , 468 U.S. 737 (1984)	12, 18
<i>Association of Data Processing Service Org., Inc. v. Camp</i> , 397 U.S. 150 (1970)	10
<i>Babbitt v. Sweet Home Chapter of Communities for a Great Oregon</i> , 115 S. Ct. 2407 (1995)	3, 20
<i>Bender v. Williamsport Area School Dist.</i> , 475 U.S. 534 (1986)	17
<i>Cabinet Mountains Wilderness v. Peterson</i> , 685 F.2d 678 (D.C. Cir. 1982)	45
<i>California v. United States</i> , 438 U.S. 645 (1978) ...	7
<i>Carson-Truckee Water Conservancy Dist. v. Clark</i> , 741 F.2d 257 (9th Cir. 1984)	7
<i>Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.</i> , 333 U.S. 103 (1948)	32
<i>Clarke v. Securities Industry Ass'n</i> , 479 U.S. 388 (1987)	50
<i>Dalton v. Specter</i> , 114 S. Ct. 1719 (1994)	12, 32, 33

V

Cases—Continued:	Page
<i>Dayton Board of Educ. v. Brinkman</i> , 433 U.S. 406 (1977)	17
<i>Environmental Coalition of Broward County v. Myers</i> , 831 F.2d 984 (11th Cir. 1987)	45
<i>Environmental Defense Fund v. Thomas</i> , 870 F.2d 892 (2d Cir.), cert. denied, 493 U.S. 991 (1989)	37
<i>Escondido Mutual Water Co. v. La Jolla Band of Mission Indians</i> , 466 U.S. 765 (1984)	23
<i>FTC v. Standard Oil Co. of California</i> , 449 U.S. 232 (1980)	35
<i>FW/PBS Inc. v. City of Dallas</i> , 493 U.S. 215 (1990)	18
<i>Franklin v. Massachusetts</i> , 505 U.S. 788 (1992)	12, 31, 32, 33, 35
<i>Gwaltney v. Chesapeake Bay Foundation</i> , 484 U.S. 49 (1987)	40
<i>Hallstrom v. Tillamook County</i> , 493 U.S. 20 (1989)	36
<i>Heckler v. Edwards</i> , 465 U.S. 870 (1984)	40
<i>Kennecott Copper Corp. v. Costle</i> , 572 F.2d 1349 (9th Cir. 1978)	43
<i>Louisville & Nashville R.R. v. Mottley</i> , 211 U.S. 149 (1908)	49
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992)	11, 12, 17, 18, 19, 27, 29
<i>Martin v. OSHRC</i> , 499 U.S. 144 (1991)	23
<i>Mitchell v. Maurer</i> , 293 U.S. 237 (1934)	17
<i>Monongahela Power Co. v. Reilly</i> , 980 F.2d 272 (4th Cir. 1993)	37
<i>National Wildlife Fed'n v. Coleman</i> , 529 F.2d 359 (5th Cir.), cert. denied, 429 U.S. 979 (1976)	4, 20, 21, 34
<i>Nebraska v. Wyoming</i> , 115 S. Ct. 1933 (1995)	28
<i>O'Neill v. United States</i> , 50 F.3d 677 (9th Cir.), cert. denied, 116 S. Ct. 672 (1995)	7

VI

Cases—Continued:

Page

<i>Oljato Chapter of Navajo Tribe v. Train</i> , 515 F.2d 654 (D.C. Cir. 1975)	43
<i>Pierce v. Underwood</i> , 487 U.S. 552 (1988)	49
<i>Reno v. Catholic Social Services, Inc.</i> , 113 S. Ct. 2485 (1993)	34
<i>Roosevelt Campobello Int'l Park v. EPA</i> , 684 F.2d 1041 (1st Cir. 1982)	4, 21
<i>Ruckelshaus v. Sierra Club</i> , 463 U.S. 680 (1983) ..	43
<i>Sierra Club v. Froehlke</i> , 534 F.2d 1289 (8th Cir. 1976)	4, 21
<i>Sierra Club v. Morton</i> , 405 U.S. 727 (1972)	19
<i>Sierra Club v. Thomas</i> , 828 F.2d 783 (D.C. Cir. 1987)	37
<i>Sierra Club v. Yeutter</i> , 926 F.2d 429 (5th Cir. 1991)	45
<i>Simon v. Eastern Kentucky Welfare Rights Org.</i> , 426 U.S. 26 (1976)	12, 18, 27
<i>TVA v. Hill</i> , 437 U.S. 153 (1978)	47
<i>Tribal Village of Akutan v. Hodel</i> , 869 F.2d 1185 (9th Cir. 1988), cert. denied, 493 U.S. 873 (1989) ...	4, 21
<i>United States v. Mitchell</i> , 445 U.S. 535 (1980)	30
<i>United States v. Oregon</i> , 44 F.3d 758 (9th Cir. 1994), cert. denied, 116 S. Ct. 378 (1995)	7
<i>Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.</i> , 454 U.S. 464 (1982)	18, 27
<i>Village of False Pass v. Clark</i> , 733 F.2d 605 (9th Cir. 1984)	45
<i>Warth v. Seldin</i> , 422 U.S. 490 (1975)	18
<i>Westlands Water Dist. v. Firebaugh Canal</i> , 10 F.3d 667 (9th Cir. 1993)	28
<i>Whitmore v. Arkansas</i> , 495 U.S. 149 (1990)	17

Constitution, statutes and regulations:

U.S. Const. Art. III	<i>passim</i>
Act of Feb. 9, 1905, ch. 567, 33 Stat. 714	6

VII

Statutes and regulations—Continued:

Page

Administrative Procedure Act, 5 U.S.C. 701 <i>et seq.</i> ..	9, 12
5 U.S.C. 704	12, 30, 35
5 U.S.C. 706(2)(A)	28
Census Act, 13 U.S.C. 141(b)	31
Clean Air Amendments of 1970, Pub. L. No. 91-604, § 12(a), 84 Stat. 1706	36, 41
42 U.S.C. 7604(a)	42
42 U.S.C. 7604(a)(1)	42, 43
42 U.S.C. 7607(b)	42
42 U.S.C. 7607(e)	42
Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, Tit. XXIX, 104 Stat. 1808	32
Endangered Species Act of 1973, 16 U.S.C. 1531 <i>et seq.</i> :	
§ 2(b), 16 U.S.C. 1531(b)	2
§ 3(3), 16 U.S.C. 1532(3)	49
§ 3(15), 16 U.S.C. 1532(15)	2
§ 3(19), 16 U.S.C. 1532(19)	3
§ 4, 16 U.S.C. 1533	2, 36, 37, 39, 43
§ 4(a)(3), 16 U.S.C. 1533(a)(3)	38
§ 4(b)(2), 16 U.S.C. 1533(b)(2)	38
§ 4(d), 16 U.S.C. 1533(d)	2
§ 7, 16 U.S.C. 1536	7, 37, 42
§ 7(a)(1), 16 U.S.C. 1536(a)(1)	49
§ 7(a)(2), 16 U.S.C. 1536(a)(2)	2, 4, 21
	25, 26, 40, 45, 47
§ 7(b), 16 U.S.C. 1536(b)	3, 20
§ 7(b)(3)(A), 16 U.S.C. 1536(b)(3)(A) ...	3, 21, 24, 46
§ 7(b)(4), 16 U.S.C. 1536(b)(4)	3
§ 7(b)(4)(i), 16 U.S.C. 1536(b)(4)(i)	4, 25
§ 7(b)(4)(ii), 16 U.S.C. 1536(b)(4)(ii)	4, 7, 25
§ 7(b)(4)(iv), 16 U.S.C. 1536(b)(4)(iv)	4, 7, 25
§ 7(c), 16 U.S.C. 1536(c)	3, 7
§ 7(n), 16 U.S.C. 1536(n)	41
§ 7(o)(2), 16 U.S.C. 1536(o)(2)	4, 25
§ 9, 16 U.S.C. 1538	2, 4, 25, 26
§ 9(a)(1), 16 U.S.C. 1538(a)(1)	2
§ 11(a), 16 U.S.C. 1540(a)	5
§ 11(b), 16 U.S.C. 1540(b)	5

VIII

Statutes and regulations—Continued:	Page
§ 11(e)(6), 16 U.S.C. 1540(e)(6)	5
§ 11(g), 16 U.S.C. 1540(g)	2, 41
§ 11(g)(1), 16 U.S.C. 1540(g)(1)	5, 9, 36
§ 11(g)(1)(A), 16 U.S.C. 1540(g)(1)(A)	<i>passim</i>
§ 11(g)(1)(B), 16 U.S.C. 1540(g)(1)(B)	5
§ 11(g)(1)(C), 16 U.S.C. 1540(g)(1)(C)	6, 13, 37
	38, 39
§ 11(g)(2)(A), 16 U.S.C. 1540(g)(2)(A)	49
§ 11(g)(2)(A)(i), 16 U.S.C. 1540(g)(2)(A)(i)	5, 40
§ 11(g)(2)(A)(ii), 16 U.S.C. 1540(g)(2)(A)(ii) ...	5, 40
§ 11(g)(2)(A)(iii), 16 U.S.C. 1540(g)(2)(A)(iii) .	5, 40
§ 11(g)(2)(C), 16 U.S.C. 1540(g)(2)(C)	6
§ 11(g)(4), 16 U.S.C. 1540(g)(4)	49
Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, § 7(2), 96 Stat. 1425	39
Equal Access to Justice Act, Pub. L. No. 96-481, Tit. II, 94 Stat. 2325	49
28 U.S.C. 2412(d)(1)(A)	49
28 U.S.C. 2412(d)(2)(B)	49
Federal Power Act, § 4(e), 16 U.S.C. 797(e)	23
National Environmental Policy Act, 42 U.S.C. 4331 <i>et seq.</i>	9
Noise Control Act of 1972, 42 U.S.C. 4901 <i>et seq.</i> :	
42 U.S.C. 4911	44
42 U.S.C. 4915	44
Reclamation Act of 1902, 43 U.S.C. 372 <i>et seq.</i>	6
Resource and Conservation Recovery Act of 1976, 42 U.S.C. 6901 <i>et seq.</i> :	
42 U.S.C. 6972	44
42 U.S.C. 6976	44
Safe Drinking Water Act, 42 U.S.C. 300f <i>et seq.</i> :	
42 U.S.C. 300j-7	44
42 U.S.C. 300j-8	44
Toxic Substances Control Act, 15 U.S.C. 2601 <i>et seq.</i> :	
15 U.S.C. 2618	44
15 U.S.C. 2619	44
2 U.S.C. 2a(a)	31
28 U.S.C. 1331	9
28 U.S.C. 2201	9

IX

Statutes and regulations—Continued:	Page
42 U.S.C. 1857h-2(a) (1970)	42
43 U.S.C. 390uu	28
50 C.F.R.:	
Pt. 17:	
Section 17.11	2
Section 17.21	3
Section 17.31	3
Pt. 222:	
Section 222.23(a)	2
Section 227.4	2
Pt. 402	3
Section 402.01(b)	2
Section 402.02	3, 46
Section 402.04(g) (1978)	22
Section 402.14	3, 7
Section 402.14(h)(3)	46
Section 402.15(a)	4, 22
Section 402.16	8
Miscellaneous:	
117 Cong. Rec. 30,852 (1971)	41
Kenneth Culp Davis & Richard J. Pierce, Jr., II <i>Administrative Law Treatise</i> (3d ed. 1994)	34
Michael S. Greve, <i>The Private Enforcement of Environmental Law</i> , 65 Tul. L. Rev. 339 (1990) ...	36
Jeffrey G. Miller, <i>Private Enforcement of Federal Pollution Control Laws Part I</i> , 13 Env'tl. L. Rptr. 10,309 (1983)	36
43 Fed. Reg. 871 (1978)	22
51 Fed. Reg. (1986):	
p. 19,927	38
p. 19,928	4, 22
p. 19,956	4, 20, 21, 23
53 Fed. Reg. 27,130 (1988)	2
59 Fed. Reg. 61,744 (1994)	38
H.R. Conf. Rep. No. 1783, 91st Cong., 2d Sess. (1970)	43
H.R. Conf. Rep. No. 697, 96th Cong., 1st Sess. (1979)	20

Miscellaneous—Continued:	Page
H.R. Rep. No. 412, 93d Cong., 1st Sess. (1973)	41
H.R. Rep. No. 1625, 95th Cong., 2d Sess. (1978)	20, 21
S. Rep. No. 1196, 91st Cong., 2d Sess. (1970)	42
S. Rep. No. 418, 97th Cong., 2d Sess. (1982)	26, 39-40

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-813

BRAD BENNETT, ET AL., PETITIONERS

v.

MICHAEL SPEAR¹, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 63 F.3d 915. The order of the district court (Pet. App. 19-29) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1995. The petition for a writ of certiorari was filed on November 21, 1995, and was granted on March 25, 1996 (116 S. Ct. 1316). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

¹ On July 4, 1994, Michael Spear replaced Marvin Plenert as Regional Director of the United States Fish and Wildlife Service.

STATUTORY PROVISIONS INVOLVED

Sections 7(a)(2) and 11(g) of the Endangered Species Act of 1973, as amended, 16 U.S.C. 1536(a)(2) and 1540(g), are set forth at App., *infra*, 1a-4a.

STATEMENT

1. Congress enacted the Endangered Species Act of 1973 (ESA or Act) to protect and conserve endangered and threatened species. 16 U.S.C. 1531(b). To accomplish that goal, Congress directed the Secretaries of Commerce and the Interior to list threatened and endangered species and designate their critical habitats. See 16 U.S.C. 1533.² The listed species at issue in this case are the Lost River sucker and the shortnose sucker, two fish that were listed as endangered on July 18, 1988. See 53 Fed. Reg. 27,130.

Section 7(a)(2) of the ESA requires that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary [of Commerce or the Interior, see note 2, *supra*], insure that any action authorized, funded or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. 1536(a)(2).³

² The Secretary of the Interior and the Secretary of Commerce share responsibility for listing species and for other ESA duties. See 16 U.S.C. 1532(15). The Secretary of the Interior, who implements the ESA through the Fish and Wildlife Service (FWS or Service), has responsibility for the endangered species of fish at issue in this case. See 50 C.F.R. 17.11, 402.01(b). The National Marine Fisheries Service (NMFS) administers the Act with respect to the species under the jurisdiction of the Secretary of Commerce. See 50 C.F.R. 222.23(a), 227.4.

³ In addition, Section 9 of the ESA prohibits the taking of any endangered species within the United States. 16 U.S.C. 1538(a)(1). Section 4(d) of the Act authorizes the Secretary to promulgate regulations for the conservation of species listed as threatened, see 16 U.S.C. 1533(d), and the prohibitions included in Section 9 have been

Regulations promulgated jointly by the two Secretaries furnish a structure for consultation. See 50 C.F.R. Pt. 402; see also 16 U.S.C. 1536(b) and (c). Under the regulations, the agency proposing the action (the action agency) determines in the first instance whether a proposed action "may affect" a listed species. 50 C.F.R. 402.14. If the action agency determines that the proposed action "may affect" a listed species, it is then to enter into formal consultation with the Service, unless the action agency has concluded through preparation of a biological assessment or informal consultation that the action is not likely to adversely affect the listed species. *Ibid*.

Following formal consultation, the Service issues a biological opinion stating whether the proposed action is likely to jeopardize the continued existence of the listed species. 16 U.S.C. 1536(b); 50 C.F.R. 402.14. If the Service concludes that jeopardy is likely, it must suggest any reasonable and prudent alternatives that it believes would avoid jeopardy. 16 U.S.C. 1536(b)(3)(A). If the opinion is "no jeopardy" or "jeopardy with reasonable and prudent alternatives," and if the proposed action or reasonable and prudent alternative will nevertheless effect an "incidental taking" of a listed species,⁴ the biological opinion is accompanied by an incidental take statement. See 16 U.S.C. 1536(b)(4). That statement details the anticipated impacts to the listed species through incidental takings, specifies reasonable and prudent measures to minimize that impact,

extended by regulation to threatened species, see 50 C.F.R. 17.31, 17.21. The ESA defines "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. 1532(19); see *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407 (1995).

⁴ "Incidental takings" are "takings that result from, but are not the purpose of, carrying out an otherwise lawful activity." 50 C.F.R. 402.02.

and sets forth terms and conditions (including reporting requirements) that must be complied with by the action agency to implement those measures. 16 U.S.C. 1536(b) (4)(i), (ii) and (iv). If the action agency complies with the terms and conditions of the incidental take statement, any takings that result from its action are exempt from the taking prohibition of Section 9. See 16 U.S.C. 1536(o)(2).

After engaging in formal consultation, the action agency must determine "whether and in what manner to proceed with the action," in light of the Service's biological opinion and any other relevant information. 50 C.F.R. 402.15(a). Given the Secretary's "primary responsibility" for implementation of the Act, *National Wildlife Fed'n v. Coleman*, 529 F.2d 359, 371 (5th Cir.), cert. denied, 429 U.S. 979 (1976), an agency that chooses to deviate from the Service's recommendations bears the burden of "articulat[ing] in its administrative record its reasons for disagreeing with the conclusions of a biological opinion." 51 Fed. Reg. 19,956 (1986) (preamble to FWS/NMFS regulations). In the government's experience, action agencies very rarely choose to engage in conduct that the Service believes will jeopardize a listed species. As a legal matter, however, the action agency retains the ultimate responsibility for determining whether, and in what manner, a proposed action can proceed in compliance with Section 7(a)(2)'s no-jeopardy mandate. See, e.g., *Tribal Village of Akutan v. Hodel*, 869 F.2d 1185, 1193-1194 (9th Cir. 1988), cert. denied, 493 U.S. 873 (1989); *Roosevelt Campobello Int'l Park v. EPA*, 684 F.2d 1041, 1049 (1st Cir. 1982); *Sierra Club v. Froehlke*, 534 F.2d 1289, 1303-1304 (8th Cir. 1976); *National Wildlife Fed'n*, 529 F.2d at 371; 51 Fed. Reg. 19,928 (1986) (preamble to FWS/NMFS regulations explains that the consulting agency performs an "advisory function under section 7" and that the action agency "makes the ultimate decision as to whether its proposed

action will satisfy the requirements of section 7(a)(2)"); pages 21-22, *infra*.

Primary responsibility for enforcement and implementation of the ESA is entrusted to officials of the federal government. See, e.g., 16 U.S.C. 1540(a), (b) and (e)(6). The Act also contains a provision for "citizen suits." That provision states that

any person may commence a civil suit on his own behalf —

(A) to enjoin any person, including the United States and any other governmental instrumentality or agency * * * who is alleged to be in violation of any provision of [the Act] or regulation issued under the authority thereof; or

* * * * *

(C) against the Secretary [of Commerce or the Interior] where there is alleged a failure * * * to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary.

16 U.S.C. 1540(g)(1).⁵ A suit under Section 1540(g)(1)(A) may not be commenced "prior to 60 days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation." 16 U.S.C. 1540(g)(2)(A)(i). Such suits are also barred if the Secretary has commenced civil enforcement proceedings, 16 U.S.C. 1540(g)(2)(A)(ii), or if the United States is "diligently prosecuting a criminal action" to redress the alleged violation, 16 U.S.C. 1540(g)(2)(A)(iii). Citizen suits against the Secretary under

⁵ A third class of citizen suits is now obsolete. See 16 U.S.C. 1540(g)(1)(B) (authorizing suits to compel the Secretary to impose prohibitions on takings during the 15 months that followed the enactment of the ESA in 1973).

Section 1540(g)(1)(C) for failure to perform nondiscretionary duties may not be brought "prior to sixty days after written notice has been given to the Secretary," unless the suit involves "an emergency posing a significant risk to the well-being of any species of fish or wildlife or plants." 16 U.S.C. 1540(g)(2)(C).

2. The Secretary of the Interior authorized the creation of the Klamath Irrigation Project in 1905 in accordance with the Reclamation Act of 1902, 43 U.S.C. 372 *et seq.*, and the Act of February 9, 1905, ch. 567, 33 Stat. 714. Administered by the Bureau of Reclamation (Bureau or BOR), which is located within the Department of the Interior, the Project is composed of lakes, rivers, dams, and irrigation canals in southern Oregon and northern California. The Klamath Project currently serves approximately 240,000 irrigable acres. Gov't D. Ct. Br. Exh. 1, at 1.

Klamath Project water is stored primarily in Upper Klamath Lake and in other reservoirs in the Lost River system, including the Gerber Reservoir in Oregon and the Clear Lake Reservoir in California. Gov't D. Ct. Br. Exh. 1, at 1. The Project delivers water via a system of canals to lands within the Klamath Basin. Delivery operations begin in January, when water from the Klamath River is delivered to lands throughout the Lower Klamath area. *Id.* at 2. Typically, diversions from Upper Klamath Lake run from March or early April through October, and water is released from the Gerber and Clear Lake Reservoirs from mid-April until early October. *Id.* at 2-3. Normal lake elevations, river flows, and diversions of water within the Klamath Project system can be modified by flood or drought conditions. *Id.* at 3.

The volume of Klamath Project water provided to a water user is based on a number of factors, including the nature and extent of the state-based water rights, the

terms and conditions of the applicable contracts, the flood or drought conditions in the Klamath Basin, and the available water supply. See generally *California v. United States*, 438 U.S. 645 (1978); *O'Neill v. United States*, 50 F.3d 677 (9th Cir.), cert. denied, 116 S. Ct. 672 (1995); *Carson-Truckee Water Conservancy Dist. v. Clark*, 741 F.2d 257 (9th Cir. 1984). A state-initiated adjudication of water rights is currently ongoing to determine claims to surface water in the Klamath Basin in Oregon. See *United States v. Oregon*, 44 F.3d 758 (9th Cir. 1994), cert. denied, 116 S. Ct. 378 (1995). The Bureau is also in the process of developing a long-term operating plan for the Klamath Project. Pending completion of that plan, the allocation of water from the Klamath Project proceeds on a year-to-year basis.

3. In February 1992, the BOR completed and forwarded to the FWS a biological assessment of the effects of the long-term operation of the Klamath Project on listed species. See 16 U.S.C. 1536(c). The Bureau determined, *inter alia*, that the Project's operation might affect the Lost River and shortnose suckers. The Bureau therefore requested formal consultation with the FWS pursuant to 16 U.S.C. 1536 and 50 C.F.R. 402.14. Pet. App. 3; Gov't C.A. Br. 7-9.

In July 1992, the FWS issued a biological opinion. See J.A. 18-117. The FWS concluded that the "long-term operation of the Klamath Project was likely to jeopardize the continued existence of the Lost River and shortnose suckers." Pet. App. 3. The FWS identified reasonable and prudent alternatives that it believed would avoid jeopardy, including the imposition of minimum lake levels for the Upper Klamath Lake and the Clear Lake and Gerber Reservoirs. *Ibid.*; see J.A. 86-92. Pursuant to 16 U.S.C. 1536(b)(4)(ii) and (iv), the biological opinion also identified reasonable and prudent measures intended to minimize the

extent of incidental takings associated with the operation of the Project, and terms and conditions for implementing those measures. J.A. 92-96. The Bureau notified the FWS that it intended to adopt the FWS's recommendations. Pet. App. 3.⁶ The record contains no information concerning the effect, if any, that this statement of intention had on the operation of the Klamath Project for the balance of 1992 and/or any subsequent year.

4. Petitioners are two individual ranch operators and two irrigation districts in the State of Oregon. They receive Klamath Project water, including water stored in the Gerber and Clear Lake Reservoirs. In March 1993, petitioners filed the present action, seeking to compel the FWS to withdraw portions of its 1992 biological opinion. Pet. App. 31-44. Petitioners named as defendants two FWS officials and the Secretary of the Interior. *Id.* at 31-32. Neither the Bureau of Reclamation nor any of its officials was named as a defendant, and the Secretary was identified

⁶ Subsequently, the Bureau reinitiated formal consultation on the Clear Lake Reservoir operations of the Klamath Project, based in part on its determination that the reasonable and prudent alternatives presented in the July 1992 biological opinion were not logistically feasible and that the Bureau had new information regarding the operation of the Clear Lake Reservoir. Gov't D. Ct. Reply Br. Exh. 2; see 50 C.F.R. 402.16. Based on a new operations model for Clear Lake Reservoir, the Bureau proposed the establishment of lower minimum lake levels than those suggested in the biological opinion and concluded that its revised proposed action was not likely to jeopardize the continued existence of the listed fish. In August 1994, the FWS issued a supplemental biological opinion, which included the establishment of such lower minimum lake levels with respect to the Clear Lake Reservoir as a modification of the reasonable and prudent alternatives set forth in the biological opinion. Gov't C.A. Br. 9 n.7. In addition, the Bureau has reinitiated formal consultation on the long-term operations of the entire Klamath Project. No biological opinion resulting from this latest consultation has yet been issued by the FWS.

only as the official "empowered by the ESA to make jeopardy determinations concerning threatened and endangered species." *Id.* at 35.

Petitioners asserted jurisdiction under the citizen suit provision of the ESA, 16 U.S.C. 1540(g)(1), and the federal question and declaratory judgment provisions of the Judicial Code, 28 U.S.C. 1331 and 28 U.S.C. 2201. Pet. App. 33. Their complaint alleged that the defendants (respondents in this Court) had violated the ESA and implementing regulations by (1) "improperly concluding * * * that the [Bureau's] continued operation of the Klamath Project * * * is likely to jeopardize the continued existence of the Lost River and shortnose suckers," *id.* at 40-41; (2) "improperly imposing restrictions on the withdrawal of irrigation water from Clear Lake and Gerber reservoirs," *id.* at 41; and (3) "implicitly determining critical habitat for the Lost River suckers and the shortnose suckers in Clear Lake and Gerber reservoirs * * * without considering the economic impact of that determination," *id.* at 42.⁷

5. The government moved to dismiss the complaint. The government pointed out that the Bureau rather than the FWS retained final authority over the allocation of Klamath Project water, and argued that petitioners' failure to name the BOR as a defendant or to challenge any action by the Bureau precluded their suit from going forward. See Gov't D. Ct. Br. 10-15. The district court granted the government's motion to dismiss. Pet. App. 19-

⁷ Petitioners' complaint also alleged related claims attacking the biological opinion under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* Pet. App. 40-42. In addition, their complaint alleged that respondents had violated the National Environmental Policy Act, 42 U.S.C. 4331 *et seq.*, by failing to perform an environmental analysis on the biological opinion's alleged *de facto* designation of critical habitat. Pet. App. 42-43.

29. The court observed that "the Secretary's biological opinion is advisory in nature and does not compel compliance with its recommendations or require agencies to act or refrain from acting in any particular manner." *Id.* at 24. It concluded that petitioners' interest in utilizing Klamath Project water "conflict[ed] with the Lost River and shortnose suckers' interest in using the water for habitat," and that petitioners "do not have standing under ESA based on an interest which conflicts with the interests sought to be protected by the Act." *Id.* at 27. The court also concluded that the biological opinion did not constitute a *de facto* determination of critical habitat for the endangered suckers. *Id.* at 28 n.4.

6. The court of appeals affirmed. Pet. App. 1-18. The court framed the question before it as "whether [petitioners'] action is precluded by the zone of interests test"—i.e., the requirement first articulated in actions under the APA that a plaintiff challenging administrative agency action "must show that 'the interest sought to be protected by [him was] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Id.* at 4-5 (quoting *Association of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 153 (1970)) (brackets in original). The court determined that a zone of interests test applies to suits brought under the ESA's citizen suit provision, Pet. App. 6-11, and that "only plaintiffs who allege an interest in the preservation of endangered species fall within the zone of interests protected by the ESA," *id.* at 11. The court observed that petitioners' complaint "belies any assumption that they seek compliance with the statute in order to further the goal of species preservation." *Id.* at 16. Rather, the court continued, petitioners "claim a competing interest—an interest in using the very water that the government believes is necessary for the preservation

of the species." *Ibid.* Accordingly, the court held that petitioners lacked standing to bring their claims under the ESA, *id.* at 17, and it affirmed the district court's dismissal of the complaint, *id.* at 18.

SUMMARY OF ARGUMENT

I. Even if the allegations of petitioners' complaint are taken as true and are generously construed, petitioners have failed to satisfy the standing requirements of Article III of the Constitution. To invoke the jurisdiction of a federal court, a plaintiff must establish that (1) he has suffered an injury in fact that (2) is fairly traceable to the challenged conduct of the defendant and (3) is likely to be redressed by a favorable judicial ruling. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

Petitioners' complaint fails to satisfy any of those three requirements. Their complaint alleged that the Bureau's acceptance of the FWS's recommendations would reduce the aggregate amount of water available from the Klamath Project. Petitioners did not allege, however, that acceptance of those recommendations would reduce the amount of water that *they* would receive. Absent such an allegation, petitioners' complaint fails adequately to allege injury in fact. Even if petitioners had adequately alleged a concrete injury, their complaint would not satisfy the other requirements for standing. The FWS's biological opinion did not legally compel the BOR to alter the manner in which it allocated Klamath Project water. Any injury that petitioners may have suffered is therefore traceable not to the FWS's issuance of the biological opinion, but to the Bureau's decisions regarding the allocation of Project water; yet petitioners failed either to name the Bureau as a defendant or to identify any action by the Bureau causing them harm. Any injury suffered by petitioners also would not be redressable by a favorable

judicial decision, since the Bureau would remain free to adopt the same water allocation policies, based on considerations wholly independent of the ESA, even if the FWS's biological opinion were withdrawn. Petitioners have therefore failed to satisfy the constitutional requirements for standing. See *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-44 (1976); *Defenders of Wildlife*, 504 U.S. at 568-571 (opinion of Scalia, J.); *Allen v. Wright*, 468 U.S. 737, 751 (1984).

II. Even if petitioners satisfied the requirements of Article III, their present claims against the Service could not go forward, since no statutory waiver of sovereign immunity authorizes their suit.

A. The usual avenue for obtaining judicial review of federal agency action is the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, which authorizes review of "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. 704. This Court's decisions make clear, however, that an agency's recommendation to another governmental decisionmaker is not reviewable "final agency action." See *Franklin v. Massachusetts*, 505 U.S. 788 (1992); *Dalton v. Specter*, 114 S. Ct. 1719 (1994). A biological opinion issued by the Service does not conclusively determine whether and how an agency may proceed with a project or other action. That determination is left to the action agency. In the instant case, the final decisions regarding the amounts and recipients of water releases from the Klamath Project were made by the Bureau of Reclamation. The biological opinion at issue in this case therefore is not subject to review under the APA, except in the context of a challenge to some final action taken by the Bureau in reliance upon the opinion.

B. Nor are petitioners' claims cognizable under the ESA citizen suit provision. That provision authorizes "any person" to commence a civil action "to enjoin any

person * * * who is alleged to be in violation of" the Act or implementing regulations, 16 U.S.C. 1540(g)(1)(A), or against the Secretary of Commerce or the Interior for failure to perform certain nondiscretionary duties relating to the process of listing endangered and threatened species, 16 U.S.C. 1540(g)(1)(C). Petitioners' suit is not cognizable under the latter provision, since petitioners have not alleged the breach of any such nondiscretionary duty. For two reasons, petitioners' suit is also not cognizable under Section 1540(g)(1)(A).

First, the text and history of the citizen suit provision make clear that Section 1540(g)(1)(A) is not a mechanism for judicial review of the Secretary's administration of the ESA. Section 1540(g)(1)(C), which authorizes citizen suits where the Secretary is alleged to have failed to perform certain nondiscretionary duties, would be superfluous if errors made by the Service in its implementation of the ESA were redressable under Section 1540(g)(1)(A) as "violations" of the Act. The history of the ESA citizen suit provision, and its relationship to similar provisions in other environmental statutes, provide further evidence that Section 1540(g)(1)(A) is inapplicable here. Section 1540(g)(1)(A) furnishes a means by which private plaintiffs may enforce the ESA against regulated parties—not a mechanism for challenging the Secretary's performance of his administrative duties under the Act, including the furnishing of biological opinions.

Even if Section 1540(g)(1)(A) could sometimes provide a basis for a suit challenging the Secretary's implementation of the ESA, it would not apply here. Any review under the citizen suit provision should be conducted in accordance with traditional principles of administrative law—and, in particular, with the rule that agency action is reviewable only when it is final and has a concrete impact on the challenging party. Because neither the text nor

the history of Section 1540(g)(1)(A) suggests that Congress intended to dispense with traditional requirements of finality and ripeness, that provision may not be used to attack the biological opinion in isolation from any action by the Bureau.

C. Contrary to petitioners' assertions, the non-cognizability of their current claims does not insulate a biological opinion from allegations that it recommended unreasonable restrictions on the use of natural resources. Decisions made by an action agency in reliance upon a biological opinion may be challenged either by persons asserting an interest in listed species or by persons asserting a competing interest in the resources in question. In either type of suit, a reviewing court may scrutinize the Service's biological opinion and may vacate the action agency's decision if it concludes that the biological opinion is arbitrary and capricious.

ARGUMENT

The ESA citizen suit provision authorizes "any person" to file a civil action "to enjoin any person, including the United States * * *, who is alleged to be in violation of" the Act or implementing regulations. 16 U.S.C. 1540(g)(1)(A). Petitioners have invoked that provision in a suit directly against the FWS to challenge a biological opinion issued by the FWS, arguing that the Service's conclusions were unsupported by the pertinent scientific data. Petitioners *assume* that the biological opinion could have been challenged in a suit directly against the FWS under Section 1540(g)(1)(A) by an environmental organization or other plaintiff claiming that the opinion was based on inadequate scientific evidence or analysis and was insufficiently protective of listed species. They argue that resource-users should have an equivalent right to invoke the citizen suit provision. As framed by petitioners, the

questions presented in this case are (1) whether a "zone of interests" test governs standing under the ESA citizen suit provision, and (2) if so, whether resource-users fall within that "zone of interests."

The government views this case from a fundamentally different perspective. We agree with the court of appeals that petitioners' challenge to the biological opinion is not cognizable under the citizen suit provision. We do not believe, however, that the proper disposition of this case involves the application of zone of interests standing principles. Rather, we believe that the basic *premise* of petitioners' argument is wrong: in our view, the biological opinion at issue here would *not* have been subject to challenge by plaintiffs asserting an interest in the protection of listed species, except within the context of a suit against the *Bureau of Reclamation* challenging actions it has taken in reliance on the Service's recommendations.

A biological opinion provides the Service's views as to whether and how a federal agency may proceed with a proposed action in a manner that does not jeopardize the continued existence of a listed species. Although the action agency typically gives very substantial weight to the Service's recommendations, it is not legally obligated to accept the Service's advice. Under the Administrative Procedure Act, the biological opinion therefore is not "final agency action" subject to a direct judicial challenge. Nothing in the ESA citizen suit provision authorizes a legal challenge to non-final administrative action (here, the issuance of the biological opinion) that is unreviewable under traditional principles of administrative law. When the action agency acts on the recommendations of the Service, however, the action agency's conduct is subject to judicial challenge, either by plaintiffs who assert an interest in the preservation of listed species, or by those who allege that the agency has imposed unreasonable

constraints on the use of natural resources. In reviewing such challenges, moreover, a court may scrutinize the biological opinion and its underlying administrative record (including the scientific evidence it contains) in order to assess the reasonableness of its conclusions.

The rule that a biological opinion may be challenged only within the context of a suit against the action agency imposes no special disability upon plaintiffs, like petitioners, who assert an economic interest in the use of natural resources. Rather, that rule applies equally to environmental plaintiffs alleging that the opinion is insufficiently protective of listed species. Plaintiffs seeking to challenge biological opinions have generally named action agencies as defendants and have identified specific actions taken (or intended to be taken) in reliance upon the biological opinions. Petitioners, by contrast, declined to name the Bureau as a defendant, and they failed to identify any action by the Bureau having a concrete impact upon their interests. Thus, the question in this case is not whether users of natural resources comprise a disfavored class of plaintiffs. The question instead is whether petitioners may evade the force of generally applicable rules governing the mode and timing of judicial review of federal agency action. We believe that that question should be answered in the negative, and that petitioners' suit was therefore properly dismissed.

In Part I below, we explain why petitioners lack standing under Article III to challenge the Service's issuance of the biological opinion. In Part II, we show that this suit should be dismissed even if petitioners are found to satisfy the constitutional requirements for standing, because

their claims directly against the FWS are not cognizable under either the APA or the ESA citizen suit provision.⁸

I. THE ALLEGATIONS OF PETITIONERS' COMPLAINT FAIL TO SATISFY THE REQUIREMENTS FOR STANDING UNDER ARTICLE III OF THE CONSTITUTION

Article III of the Constitution confines the jurisdiction of the federal courts to actual "cases" and "controversies," and "the doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), this Court reviewed the principles governing standing to sue in the context of an ESA case. The Court reiterated that plaintiffs seeking to invoke a federal court's jurisdiction must establish (1) that they have suffered an "injury in fact"—an "invasion of a legally-protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical," *id.* at 560 (citations and internal quotation marks

⁸ Those arguments are properly before the Court. The government argued below that claims that federal agencies have done more than necessary to avoid jeopardy to a protected species are not cognizable under the ESA citizen suit provision; that the FWS's biological opinion itself had no direct impact on petitioners; that it therefore was questionable that the biological opinion constituted final agency action; and that petitioners' suit would instead properly lie against the Bureau of Reclamation. Gov't C.A. Br. 22 n.15, 23-26 & n.17. A respondent "is entitled under [the Court's] precedents to urge any grounds which would lend support to the judgment below," *Dayton Board of Educ. v. Brinkman*, 433 U.S. 406, 419 (1977), and the Court in any event has an independent obligation "to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,'" *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986) (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934)).

omitted); (2) that their injury is fairly traceable to the challenged action of the defendant, and not the result of the "independent action of some third party not before the court," *ibid.* (quoting *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)); and (3) that it is "'likely' as opposed to merely 'speculative,' that their injury will be 'redressed by a favorable decision,'" *Defenders of Wildlife*, 504 U.S. at 561 (quoting *Eastern Kentucky Welfare Rights Org.*, 426 U.S. at 38). See also, *e.g.*, *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). Those three elements are the "irreducible minimum," *Valley Forge Christian College*, 454 U.S. at 472, required by Article III.

"For purposes of ruling on a motion to dismiss, * * * both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *cf. Defenders of Wildlife*, 504 U.S. at 561 (stating that, on a motion to dismiss, the court presumes that general factual allegations embrace those specific facts necessary to support the claim). Even at the pleading stage, however, "[i]t is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Warth*, 422 U.S. at 518; see *FW/PBS Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990). Thus, petitioners must "allege * * * facts essential to show jurisdiction. If they fail to make the necessary allegations, they have no standing." *Ibid.* (citations and internal quotation marks omitted). In the present case, the allegations of petitioners' complaint, even if liberally construed, satisfy none of the three elements of standing.

A. Petitioners Have Failed To Allege Facts Which, If Taken As True, Would Demonstrate That They Have Suffered Injury In Fact

The complaint in this case alleges that petitioners Bennett and Giordano receive irrigation water from Clear Lake Reservoir, Pet. App. 33; that petitioners Horsefly Irrigation District and Langell Valley Irrigation District receive irrigation water from Clear Lake Reservoir via Lost River "pursuant to contracts with the United States," *id.* at 34; that "the BOR will abide by the restrictions imposed by the Biological Opinion," *id.* at 32; and that "[t]he restrictions on lake levels imposed in the Biological Opinion adversely affect [petitioners] by substantially reducing the quantity of available irrigation water," *id.* at 40. Petitioners have adequately alleged that the recommendations contained in the biological opinion, if adopted by the Bureau, would reduce the *aggregate* amount of water available from the Klamath Project. Petitioners have not alleged, however, that *they* have received, or can be expected to receive, less water than would otherwise have been allocated to them. Petitioners' complaint focuses on the biological opinion prepared by the FWS; it contains no allegations regarding the Bureau's water allocation practices beyond the assertion that "the BOR will abide by the restrictions imposed by the Biological Opinion." Pet. App. 32. The biological opinion, however, recommends the maintenance of minimum lake levels but does not address the manner in which available water is to be divided among interested parties. See J.A. 86-92.

"[T]he 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Defenders of Wildlife*, 504 U.S. at 563 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 734-735 (1972)). Because petitioners have not

alleged that *they* will receive reduced quantities of water, their complaint fails to satisfy the injury in fact requirement of Article III.

B. Any Injury Suffered By Petitioners Is Not Fairly Traceable To The FWS's Issuance Of The Biological Opinion

The Secretaries of the Interior and Commerce exercise "primary responsibility" for implementation of the ESA. *National Wildlife Fed'n v. Coleman*, 529 F.2d 359, 371 (5th Cir.), cert. denied, 429 U.S. 979 (1976). Cf. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407, 2416 (1995) (Secretary's interpretation of ESA provision is entitled to deference in light of "[t]he latitude the ESA gives the Secretary in enforcing the statute, together with the degree of regulatory expertise necessary to its enforcement"). The requirement that the Service prepare a biological opinion promptly upon request, see 16 U.S.C. 1536(b), would be largely superfluous if action agencies were expected routinely to duplicate the Service's efforts to assess the likely impact of proposed actions on listed species. The statutory scheme thus presupposes that the biological opinion will play a central role in the action agency's decisionmaking process, and that it will typically be based on an administrative record that is fully adequate for the action agency's decision insofar as ESA issues are concerned. And because a reviewing court will give substantial deference to the Service's views,⁹ a federal

⁹ See H.R. Conf. Rep. No. 697, 96th Cong., 1st Sess. 12 (1979) (noting with approval that "[c]ourts have given substantial weight to [the Service's] biological opinions as evidence of an [action] agency's compliance with Section 7(a)"); H.R. Rep. No. 1625, 95th Cong., 2d Sess. 12 (1978); 51 Fed. Reg. 19,956 (1986) ("Federal courts have accorded Service biological opinions great deference.").

agency that chooses to deviate from the recommendations contained in a biological opinion bears the burden of "articulat[ing] in its administrative record its reasons for disagreeing with the conclusions of a biological opinion." 51 Fed. Reg. 19,956 (1986). In the government's experience, action agencies very rarely choose to engage in conduct that the Service has concluded is likely to jeopardize the continued existence of a listed species.

As a legal matter, however, the action agency retains the ultimate responsibility for determining whether and how a proposed action may go forward in compliance with Section 7(a)(2)'s no-jeopardy mandate. See 16 U.S.C. 1536(b)(3)(A); *Tribal Village of Akutan v. Hodel*, 869 F.2d 1185, 1193-1994 (9th Cir. 1988), cert. denied, 493 U.S. 873 (1989); *Roosevelt Campobello Int'l Park v. EPA*, 684 F.2d 1041, 1049 (1st Cir. 1982); *Sierra Club v. Froehlke*, 534 F.2d 1289, 1303-1304 (8th Cir. 1976); *National Wildlife Fed'n*, 529 F.2d at 371. When Congress amended the ESA in 1978, substantially revising the consultation process, the House Committee observed that

[a]ny determination by the Fish and Wildlife Service that the activity may jeopardize the continued existence of listed species does not necessarily mandate any particular action by the acting agency. The section 7 regulations make it clear that it is the responsibility of the acting agency to determine whether to proceed with the activity or program as planned in light of its Section 7 obligations.

H.R. Rep. No. 1625, 95th Cong., 2d Sess. 12 (1978). Regulations published jointly by the FWS and the NMFS in 1986 state that, "[f]ollowing the issuance of a biological opinion, the Federal agency shall determine whether and in what manner to proceed with the action in light of its section 7 obligations and the Service's biological opinion."

50 C.F.R. 402.15(a). The preamble to those regulations explains that the Service performs an "advisory function under section 7" and that the action agency "makes the ultimate decision as to whether its proposed action will satisfy the requirements of section 7(a)(2)." 51 Fed. Reg. 19,928 (1986).¹⁰ The biological opinion at issue in the instant case therefore did not compel the Bureau to adopt higher lake levels. That opinion, moreover, contains no recommendations at all regarding the allocation of available water among potential recipients. If petitioners have suffered injury, the proximate cause of their harm is an (as yet unidentified) decision by the Bureau regarding the volume of water allocated to petitioners, not the biological opinion itself.

This does not mean that the biological opinion is shielded from judicial scrutiny. If an action agency adopts the Service's recommendations, or proceeds with a proposed action in reliance on the Service's no-jeopardy determination, the propriety of its actions will ultimately depend upon the rationality of the Service's analysis. Accordingly, judicial review of the action agency's conduct properly may include review of the analysis and recommendations contained in the biological opinion, and of the

¹⁰ The Services have consistently recognized that the action agency retains the legal authority to accept or reject the recommendations contained in a biological opinion. Thus, joint FWS/NMFS regulations issued in 1978 stated that, "[u]pon receipt and consideration of the biological opinion and recommendations of the Service, it is the responsibility of the Federal agency to determine whether to proceed with the activity or program as planned in light of its section 7 obligations." 50 C.F.R. 402.04(g) (1978). The preamble to those regulations confirmed that once consultation has taken place, "the ultimate responsibility for determining agency action in light of section 7 still rests with the particular Federal agency that was engaged in consultation." 43 Fed. Reg. 871 (1978).

scientific evidence before the Service, in order to determine whether the opinion is supported by sufficient evidence to satisfy the arbitrary and capricious standard of review. Cf. *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 778 (1984).¹¹ If the court finds the recommendations contained in the biological opinion to be arbitrary and capricious, the appropriate relief would be to vacate the action agency's decision and remand to the action agency for further consideration, perhaps informed by renewed consultation with the Service. Thus, while petitioners are not entitled to challenge the FWS's biological opinion in isolation from any action by the Bureau, the opinion would ultimately be reviewable

¹¹ In *Escondido*, the Court held that Section 4(e) of the Federal Power Act required the Federal Energy Regulatory Commission to accept without modification any conditions that the Secretary of the Interior directed to be included in licenses for hydroelectric facilities located on or near Indian reservations. 466 U.S. at 772-779. Judicial review of the license, the Court observed, would include consideration of whether those conditions were reasonable, consistent with the statute, and supported by substantial evidence. *Id.* at 778. Thus, while the challenged order would be that of the Commission (*i.e.*, the issuance of the license), the reviewing court would scrutinize the determinations made by the Secretary under the same (deferential) standard that would apply to direct review of the Secretary's conduct. *Ibid.*; cf. *Martin v. OSHRC*, 499 U.S. 144 (1991) (court reviewing an order of the Occupational Safety and Health Review Commission gives deference to the Secretary of Labor's construction of an ambiguous regulation). Where an action agency adopts the recommendations contained in a biological opinion, we believe that a similar mode of judicial review is appropriate. If the action agency chooses to deviate from the Service's recommendations, by contrast, review should focus on the reasonableness of and evidentiary support for that decision. Cf. 51 Fed. Reg. 19,956 (1986) (where action agency deviates from the Service's recommendations, it is "incumbent upon [the action] agency to articulate in its administrative record its reasons for disagreeing with the conclusions of a biological opinion").

within the context of a legal challenge to the Bureau's allocation of water.¹²

Contrary to petitioners' assertions (Br. 42, 43), we do not contend that "there is no connection between the biological opinion issued by the USFWS and re-operation of the Klamath Project by the Bureau," or that the biological

¹² Judicial assessment of the biological opinion would be based on the administrative record compiled by the Service, even though that record would not routinely be provided in its entirety to the action agency. See 16 U.S.C. 1536(b)(3)(A) ("Promptly after conclusion of consultation * * *, the Secretary shall provide to the Federal agency * * * a written statement setting forth the Secretary's opinion, and a *summary* of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat.") (emphasis added). Plaintiffs challenging agency actions taken in reliance on the Service's biological opinions frequently name the Service or the Secretary as a co-defendant. The Department of Justice does not object to that practice. In our view, however, the presence or absence of the Service as a defendant should not affect the manner in which the district court record is compiled or the standard by which the court reviews the action agency's conduct. Where an action agency adopts the recommendations contained in a biological opinion, we believe that a court reviewing the action agency's conduct should (1) admit into evidence the Service's administrative record supporting the biological opinion and (2) vacate the action agency's decision if the court found the analysis or recommendations contained in the biological opinion to be arbitrary and capricious, *whether or not the Service or the Secretary was named as a defendant*. If a court disagreed, however, and concluded that the Service's administrative record would be admissible into evidence only if the Service itself were a party, the proper response would be to join the Service as a defendant—not to decline to consider its administrative record. Both as a legal and a practical matter, meaningful judicial review of the biological opinion would be impossible if the court was foreclosed from examining the materials from which that opinion was derived. Our point is simply that the ultimate basis and focus of judicial review is a challenge to action taken by the action agency in reliance on the biological opinion, not the biological opinion standing alone.

opinion should be regarded "as a meaningless piece of paper." The statutory and regulatory scheme unquestionably presupposes that action agencies will give substantial weight to the views of the Service. The consultation process, however, is not an end in itself: it is a means of assisting federal agencies to fulfill *their* substantive obligations under Section 7(a)(2) of the Act to ensure that their actions will not jeopardize the continued existence of a listed species. The Bureau, not the FWS, is ultimately responsible for ensuring that the Klamath Project is operated in compliance with the ESA's requirements, and the Bureau retains legal authority to accept or reject the Service's recommendations. If the Bureau adopts the recommendations contained in the biological opinion, its actions are subject to judicial review at the behest of persons injured by them, and the court in conducting such review may assess the adequacy of the biological opinion—with deference, of course, to the scientific judgments of the expert agency. Review of the biological opinion is available, however, only after the Bureau has acted, and only within the context of a challenge to specific actions taken by the Bureau in reliance on that opinion.¹³

¹³ Where the Secretary concludes that a proposed action is likely to result in the incidental taking of a protected species, the biological opinion is accompanied by an incidental take statement that identifies the level of anticipated taking associated with the agency action, specifies "reasonable and prudent measures" to minimize that taking, and sets forth terms and conditions to implement those measures. 16 U.S.C. 1536(b)(4)(i), (ii), and (iv). Those takings that are in compliance with the terms and conditions specified under Section 1536(b)(4)(iv) are exempt from the takings prohibition of Section 9. See 16 U.S.C. 1536(o)(2).

Even where a biological opinion is accompanied by an incidental take statement, neither the biological opinion nor the incidental take statement legally compels or prohibits any conduct by the action agency. Actions inconsistent with the terms and conditions of the

C. Any Injury Suffered By Petitioners Is Not Redressable By A Favorable Judicial Ruling

Petitioners have not sought any relief directed against the Bureau's operation of the Klamath Project. Rather, they have requested a judicial order setting aside the biological opinion. See Pet. App. 43-44. Petitioners' request for such a ruling fails to satisfy the redressability requirement of Article III.

The fact that a contemplated agency action will not jeopardize the continued existence of a listed species does not mean that the agency is required to carry out that action. In the present case, a variety of factors wholly apart from ESA concerns may affect the Bureau's deci-

idental take statement are not *per se* unlawful; they simply "remain subject to the prohibition against takings that is contained in section 9." S. Rep. No. 418, 97th Cong., 2d Sess. 21 (1982). As a practical matter, an action agency is very unlikely to risk Section 9 liability by deviating from the terms and conditions set forth in the incidental take statement, since an incidental take statement is issued only when the Service believes that a taking is likely. The action agency remains legally free, however, to carry out the proposed action without conforming to those terms and conditions if it concludes that the action will not in fact cause a taking—subject to the risk that a reviewing court will determine that an unauthorized taking has occurred or can be expected to occur, and that the agency is therefore in violation of Section 9.

In the present case, moreover, the aspect of the biological opinion document that is the subject of petitioners' challenge—namely, the Service's identification of "reasonable and prudent alternatives" that included maintenance of higher water levels at the Clear Lake and Gerber reservoirs, see Pet. App. 39-40—is separate and distinct from the incidental take statement. See J.A. 86-92 (reasonable and prudent alternatives), 92-96 (incidental take statement). Thus, so long as the BOR fulfilled its obligations under Section 7(a)(2) by operating the Project in a manner that did not jeopardize listed species, the Bureau was not required to maintain the higher lake levels in order to comply with the terms and conditions of the incidental take statement.

sions regarding the storage, distribution, and delivery of irrigation water within the Klamath Basin. The ultimate effect of a judicial decision invalidating the biological opinion is therefore dependent upon the actions of the Bureau, "whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.); see *Eastern Kentucky Welfare Rights Org.*, 426 U.S. at 43; *Defenders of Wildlife*, 504 U.S. at 568-571 (opinion of Scalia, J.). If the Bureau of Reclamation allocates water in a manner that injures petitioners, and its action is determined to be unlawful, petitioners' injury would be redressable by an appropriate judicial order directed against the Bureau. But in the absence of any challenge to a final decision by the BOR, it is purely speculative whether a judicial order running against the Service would enable petitioners to obtain additional water.

* * * * *

The requirement that plaintiffs establish injury, causation, and redressability "tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College*, 454 U.S. at 472. Petitioners' suit directly implicates those pragmatic concerns. At the time this suit was filed, it was possible (insofar as can be determined from the allegations of the complaint) that the Bureau would decline to adopt the recommendations contained in the biological opinion;¹⁴ that those recommenda-

¹⁴ By the time the complaint in this case was filed, the Bureau had informed the Service that it intended to act in accordance with the

tions, even if implemented, would have no effect on the volume of water available to petitioners; or that the Bureau would assert an independent justification for adopting the higher lake levels recommended by the Service. If any of those events had occurred, the court's resolution of petitioners' challenge to the biological opinion would have had no concrete impact on petitioners' interests.

Once the Bureau arrived at a final decision concerning the allocation of Klamath Project water, petitioners could have sought judicial review of that decision under the APA (if the decision caused them injury) by alleging that the Bureau's refusal to release additional water was arbitrary and capricious. 5 U.S.C. 706(2)(A); see, e.g., *Westlands Water Dist. v. Firebaugh Canal*, 10 F.3d 667 (9th Cir. 1993). Alternatively, petitioners might have contended that some *other* provision of law required the Bureau to allocate additional water. See 43 U.S.C. 390uu; cf. *Nebraska v. Wyoming*, 115 S. Ct. 1933, 1942, 1944-1945 (1995) (recognizing that challenges to operation of reclamation projects may be brought in federal district court). If the Bureau had then defended its actions by relying on the biological opinion, judicial review of the Bureau's conduct would focus on whether the recommendations proffered by the Service were arbitrary and capricious. That review would include an assessment of the scientific evidence and analyses on which the Service relied. See pages 22-23, *supra*. Thus, dismissal of petitioners' complaint would not permanently insulate the biological opinion from judicial scrutiny. It would simply ensure

analysis and recommendations contained in the biological opinion. See Gov't D. Ct. Br. Exh. 6. The record contains no information, however, regarding whether and when the Bureau actually altered its water allocation practices in response to the biological opinion.

that such scrutiny would not occur unless and until the Bureau acted upon the Service's recommendations in a manner that caused petitioners harm, and that it would occur within the context of a suit between petitioners and the agency directly responsible for their alleged injury.¹⁵

¹⁵ In *Defenders of Wildlife*, the Court observed that "[t]he person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." 504 U.S. at 572 n.7. The Court explained that "one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an Environmental Impact Statement, even though he cannot establish with any certainty that the Statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years." *Ibid.* For three reasons, that principle does not control this case.

First, the hypothetical case described in *Defenders of Wildlife* involved a procedural breach committed by the same agency whose actions were ultimately responsible for the plaintiff's injury. The Court did not cast doubt on the rule that standing is ordinarily absent where the nexus between the unlawful conduct and the plaintiff's injury involves independent action by a third party not before the court. Second, a right to insist upon particular procedures would often be substantially undermined if it could be asserted only where the outcome of those procedures could be forecast with certainty. The premise of an EIS requirement, for example, is that the environmental consequences (and thus the propriety) of a particular project cannot accurately be determined without an EIS. In the present case, by contrast, any legal challenge petitioners may have to the Bureau's final decisions regarding the allocation of Klamath Project water can be asserted after those decisions have been made.

Finally, the Court in *Defenders of Wildlife* did not dispense with the requirement that plaintiffs adequately allege injury in fact. The hypothetical plaintiff in *Defenders of Wildlife* was described as living next to the dam site; there was no question that the challenged federal action (construction of the dam) would ultimately (although not immediately) cause that plaintiff injury, and likewise no question that an injunction barring construction unless an EIS were prepared would

II. EVEN IF PETITIONERS MET THE REQUIREMENTS OF ARTICLE III, THEIR SUIT COULD NOT GO FORWARD, BECAUSE THEIR CLAIMS ARE NOT COGNIZABLE UNDER EITHER THE ADMINISTRATIVE PROCEDURE ACT OR THE ESA CITIZEN SUIT PROVISION

For the foregoing reasons, petitioners fail to satisfy the requirements of Article III. Even if this Court holds to the contrary, however, it would not follow that petitioners' suit can go forward. A determination that petitioners meet the requirements of Article III would mean only that Congress *could* authorize the adjudication of this lawsuit by the federal courts—not that it has done so. "It is elementary that the United States, as sovereign, is immune from suit save as it consents to be sued." *United State v. Mitchell*, 445 U.S. 535, 538 (1980) (brackets and internal quotation marks omitted). Even if petitioners are found to have Article III standing to bring this action, no statutory waiver of sovereign immunity authorizes their challenge to the Service's biological opinion outside the context of a suit against the action agency challenging that agency's conduct.

A. Petitioners' Suit Cannot Proceed Under The Administrative Procedure Act Because The Issuance Of A Biological Opinion Is Not A Reviewable "Final Agency Action"

The usual avenue for obtaining judicial review of federal agency action is the APA, which provides, *inter alia*, for judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704. Issu-

redress that injury (albeit perhaps only temporarily). In the present case, by contrast, petitioners have failed to allege that they have received (or can be expected to receive) less water than they desire.

ance of the biological opinion in this case was not "final agency action" because it did not conclusively determine the manner in which Klamath Project water would be allocated. Rather, the final decisions regarding the amounts and recipients of water releases were made by the Bureau of Reclamation. The Service's issuance of the biological opinion therefore was not subject to review under the APA, except within the context of a challenge to the Bureau's ultimate decisions regarding the allocation of water.

This Court considered a similar issue in *Franklin v. Massachusetts*, 505 U.S. 788 (1992). Under the Census Act, the Secretary of Commerce is required to report to the President "[t]he tabulation of total population by States." 13 U.S.C. 141(b); see 505 U.S. at 792. The President is then required to "transmit to the Congress a statement showing the whole number of persons in each State, * * * and the number of Representatives to which each State would be entitled." 2 U.S.C. 2a(a); see 505 U.S. at 792. Although no President has ever transmitted to the Congress census figures different from those reported to him by the Secretary, see *id.* at 812-813 (Stevens, J., concurring in part and concurring in the judgment), the Court construed the pertinent statutes as authorizing the President to do so, see *id.* at 796-800.

Because the President retained legal authority to amend the figures reported by the Secretary, the Court held, the Secretary's report was not "final agency action" reviewable under the APA. 505 U.S. at 796-800.¹⁶ In

¹⁶ Four Justices would have held that the Secretary's report constituted reviewable "final agency action." See 505 U.S. at 808-816 (Stevens, J., concurring in part and concurring in the judgment). Those Justices concluded that the President's role under the statutory scheme was purely ministerial, and that the President lacked the legal authority to amend the figures reported to him by the Secretary. See

determining whether particular conduct constitutes "final agency action," the Court explained, "[t]he core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Id.* at 797.¹⁷ "Because the Secretary's report to the President carries no direct consequence for the reapportionment," the Court concluded, that report was "not final and therefore not subject to review." *Id.* at 798 (citation and internal quotation marks omitted). Cf. *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 112-113 (1948) ("administrative orders are not reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process").

The Court reiterated that principle two Terms later in *Dalton v. Specter*, 114 S. Ct. 1719 (1994). *Dalton* involved the Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, Tit. XXIX, 104 Stat. 1808. Under that Act, the Secretary of Defense was required to submit

id. at 810-813. The concurring Justices did not suggest, however, that a non-binding agency recommendation to another decisionmaker would constitute "final agency action."

¹⁷ The Court's disposition of the case makes clear that both halves of that question must be answered in the affirmative before an agency pronouncement will be regarded as "final agency action." The Department of Commerce had clearly "completed its decisionmaking process" when it issued its report to the President. That report was nevertheless deemed not to be "final agency action" that would "directly affect the parties," since the President retained the final authority to accept or reject the figures contained therein. Similarly here, the biological opinion represented the FWS's concluded view regarding the Klamath Project's likely impact upon listed species, but it was not "final agency action" within the meaning of the APA, since the Bureau retained ultimate legal authority over the allocation of Project water.

recommendations concerning the closure of military installations to the Defense Base Closure and Realignment Commission, an independent body. 114 S. Ct. at 1722. The Commission would then submit a report to the President, who was given two weeks in which to decide whether to approve or disapprove, in their entirety, the Commission's recommendations. *Ibid.* Plaintiffs sought review of the recommendations submitted by the Secretary and the Commission. The Court held that "[a] straightforward application of *Franklin*" foreclosed review of those recommendations under the APA, *id.* at 1724, explaining that "the President, not the Commission, takes the final action that affects the military installations," *id.* at 1725 (brackets and internal quotation marks omitted).

Under *Franklin* and *Dalton*, the Service's issuance of a biological opinion is not "final agency action." Whatever the practical likelihood that the BOR would adopt the reasonable and prudent alternatives (including the higher lake levels) identified by the Service, the Bureau was not legally obligated to do so. Even if the Bureau decided to adopt the higher lake levels, moreover, nothing in the biological opinion would constrain the BOR's discretion as to how the available water should be allocated among potential users. Like the reports at issue in *Franklin* and *Dalton*, the biological opinion therefore "carries no direct consequence" for the release of water to petitioners or other users. *Franklin*, 505 U.S. at 798; *Dalton*, 114 S. Ct. at 1724. It is the Bureau, not the FWS, that "takes the final action that affects" the allocation of water from the Klamath Project. *Id.* at 1725. Thus, even if petitioners met the requirements of Article III, they could not obtain

APA review of the biological opinion, except in the context of a challenge to actions by the BOR.¹⁸

The insusceptibility of the biological opinion to a judicial challenge independent of a decision by the action agency is further supported by the pragmatic considerations underlying the doctrine of ripeness.¹⁹ The "basic rationale" of ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149 (1967); see also *National Wildlife Fed'n*, 497 U.S. at 891. Judicial review of a biological opinion independent of any challenge to the action agency's decision would cause the disruption and

¹⁸ Unlike *Franklin*, the instant case involves a recommendation submitted by one co-equal agency to another, not a recommendation submitted by a subordinate to a superior within the same chain of command. Nothing in *Franklin* suggests, however, that the Court found dispositive the general subordination of the Secretary of Commerce to the President. The Court's analysis focused instead on the President's legal authority to reject the Secretary's recommendation with respect to a particular matter.

¹⁹ Although ripeness doctrine and the APA requirement of "final agency action" serve complementary purposes, they are not identical. "An agency action can be final, with no further administrative remedies available to a petitioner, and yet it can still fail to be 'ripe' for judicial review. The best example of this situation is an agency rule that is worded so broadly that a court cannot determine whether, or to what extent, it will cause harm to the petitioner or raise the legal issues the petitioner has asked the court to address." Kenneth Culp Davis & Richard J. Pierce, Jr., II *Administrative Law Treatise* 361 (3d ed. 1994). See, e.g., *Reno v. Catholic Social Services, Inc.*, 113 S. Ct. 2485, 2495-2496 (1993); *National Wildlife Fed'n*, 497 U.S. at 891-893.

inefficiency that ripeness principles are intended to prevent. Until the Bureau has considered the biological opinion, in conjunction with other factors bearing upon its water allocation decisions, there can be no certainty as to what those decisions will be, how they will affect particular parties, or what alternative bases might underlie the Bureau's actions. As we explain above, we believe that this uncertainty is fatal to petitioners' efforts to establish standing under Article III. But whether or not those considerations are of constitutional moment, under well-established principles of administrative law they should preclude judicial review in the absence of a clear congressional directive to permit it.²⁰

B. The Citizen Suit Provision Of The Endangered Species Act Provides No Basis For Adjudication Of Petitioners' Suit

Although petitioners' complaint relied in part on the APA, see Pet. App. 40-43, they place principal reliance on the ESA citizen suit provision. That provision states in relevant part that

any person may commence a civil suit on his own behalf —

²⁰ As we explain above, see pages 22-23, *supra*, the biological opinion *would* be subject to judicial scrutiny in the context of a legal challenge to actions taken by the Bureau in reliance upon that opinion. That mode of review is consistent with the text of the APA, which provides that "[a] preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." 5 U.S.C. 704; see *FTC v. Standard Oil Co. of California*, 449 U.S. 232, 245 (1980). That avenue for reviewing a non-binding recommendation was not available in *Franklin* and *Dalton*: because the final decisionmaker (the President) was not an "agency" within the meaning of the APA, see *Franklin*, 505 U.S. at 800-801, there was no "final agency action" to review.

(A) to enjoin any person, including the United States and any other governmental instrumentality or agency * * *, who is alleged to be in violation of any provision of [the Act] or regulation issued under the authority thereof; or

* * * * *

(C) against the Secretary [of Commerce or the Interior] where there is alleged a failure * * * to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary.

16 U.S.C. 1540(g)(1).²¹

The ESA citizen suit provision does not apply to petitioners' claims. The Service's issuance of the biological opinion at issue here was not a failure to perform a nondiscretionary duty under 16 U.S.C. 1533. Issuance of what a court might find to be an unpersuasive or inadequately supported biological opinion, moreover, would

²¹ As this Court noted in *Hallstrom v. Tillamook County*, 493 U.S. 20, 23 & n.1 (1989), a number of federal environmental statutes contain citizen suit provisions patterned after the citizen suit provision of the Clean Air Amendments of 1970, Pub. L. No. 91-604, § 12(a), 84 Stat. 1706. See Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 Tul. L. Rev. 339, 347 n.29 (1990) (citizen suit provisions of various environmental statutes "are virtually identical, largely because they were 'lifted' from the first such provision in the 1970 Clean Air Act"); Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws Part I*, 13 Env'tl. L. Rptr. 10,309, 10,311 (1983) ("There are perhaps no sections of the environmental statutes where precedent under one statute so clearly applies to others."). The citizen suit provisions typically "authorize 'any person' to commence suit to enforce the requirements of the acts against 'any person' alleged to violate them or to require the government to perform a mandatory duty under the acts." *Id.* at 10,311-10,312 (footnotes omitted). The ESA citizen suit provision conforms to that pattern.

not place the Secretary "in violation of" the Endangered Species Act or its implementing regulations.

1. *The Service's issuance of the biological opinion in this case did not constitute a failure to perform a nondiscretionary duty under 16 U.S.C. 1533*

The conduct complained of in this case was not "a failure * * * to perform any act or duty under section 1533 of [Title 16] which is not discretionary with the Secretary." 16 U.S.C. 1540(g)(1)(C). Petitioners have not contended that the Service failed to issue a biological opinion—only that the conclusions articulated in the opinion were unsupported by the pertinent scientific data.²² In any event, Section 1540(g)(1)(C) applies only where the Secretary fails to perform a nondiscretionary duty "under section 1533" of Title 16. The consultation process (including the issuance of biological opinions) is governed by Section 1536 of Title 16. Indeed, while petitioners' complaint cites Section 1540(g)(1)(C) as a basis for district court jurisdiction, see Pet. App. 41, 42, neither the complaint, the petition, nor petitioners' brief

²² The nondiscretionary duty sections of the various citizen suit provisions have been given a narrow construction. See, e.g., *Monongahela Power Co. v. Reilly*, 980 F.2d 272, 276 n.3 (4th Cir. 1993) (citing cases); *Environmental Defense Fund v. Thomas*, 870 F.2d 892, 899 (2d Cir.) ("the district court has jurisdiction * * * to compel the Administrator to perform purely ministerial acts"), cert. denied, 493 U.S. 991 (1989); *Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987) ("In order to impose a clear-cut nondiscretionary duty, we believe that a duty of timeliness must categorically mandate that *all* specified action be taken by a date-certain deadline.") (brackets and internal quotation marks omitted). Cf. *id.* at 792 ("We long ago rejected * * * the convoluted notion that EPA is under a nondiscretionary duty—for purposes of [the Clean Air Act citizen suit provision]—not to abuse its discretion.").

on the merits identifies any nondiscretionary duty that the Service is alleged to have failed to perform.²³

2. Issuance of an inadequate or erroneous biological opinion would not place the Secretary "in violation of" the ESA or implementing regulations

Petitioners' principal contention is that judicial review of the biological opinion is available under 16 U.S.C. 1540(g)(1)(A), which authorizes injunctive actions against

²³ Petitioners' complaint alleged that the Secretary had violated 16 U.S.C. 1533(b)(2) and its implementing regulations by "implicitly determining critical habitat for the Lost River suckers and the shortnose suckers * * * without considering the economic impact of that determination." Pet. App. 42. Even if that claim had merit, it would not be cognizable under Section 1540(g)(1)(C), since even an arbitrary and capricious designation of critical habitat would not constitute a failure to perform a nondiscretionary duty. See note 22, *supra*.

In any event, petitioners' claim has no basis in law. Critical habitat may be designated only through notice and comment rule-making under Section 4(a)(3) of the ESA, 16 U.S.C. 1533(a)(3). (Pursuant to Section 4(a)(3), the Secretary of the Interior has proposed a rule designating critical habitat for the endangered Lost River sucker and shortnose sucker. See 59 Fed. Reg. 61,744 (1994).) The requirement that the Secretary "tak[e] into consideration the economic impact * * * of specifying any area as critical habitat," 16 U.S.C. 1533(b)(2), applies only to the official designation of critical habitat pursuant to Section 4(a)(3). Contrary to petitioners' apparent premise, the Service's conclusion that use or destruction of particular natural resources would jeopardize a listed species does not represent an "implicit" designation of critical habitat. See 51 Fed. Reg. 19,927 (1986) ("An action could jeopardize the continued existence of a listed species through the destruction or adverse modification of its habitat, regardless of whether that habitat has been designated as 'critical habitat.'"). Indeed, the Service is not permitted—let alone required—to consider economic impacts in making the *scientific* determination whether a proposed action will or will not jeopardize the continued existence of a listed species.

any person "who is alleged to be in violation of" the ESA or its implementing regulations. For two reasons, petitioners' reliance on Section 1540(g)(1)(A) is misplaced.

a. In addition to the requirements and prohibitions applicable to persons whose on-the-ground conduct may harm a listed species, the ESA and its implementing regulations contain numerous provisions governing the Secretary's implementation of the Act. Conduct by the Secretary that is inconsistent with such provisions might in a sense be said to constitute a "violation" of the Act or regulations. The text and history of the ESA citizen suit provision indicate, however, that Section 1540(g)(1)(A) is not intended to serve as an alternative avenue for judicial review of the Secretary's implementation of the statute. Section 1540(g)(1)(A) furnishes a means by which non-federal actors may enforce the provisions of the ESA against regulated parties—not an additional mechanism for challenging the Secretary's performance of his duties as administrator of the Act.

i. The strongest textual evidence on this point is Section 1540(g)(1)(C), which authorizes citizen suits in cases where the Secretary is alleged to have failed to perform a nondiscretionary duty under Section 1533. See pages 37-38, *supra*. That provision would be superfluous if errors by the Secretary in his implementation of the ESA were subject to challenge under Section 1540(g)(1)(A) as "violations" of the Act.²⁴ The citizen suit provision also

²⁴ Section 1540(g)(1)(C) was added to the ESA in 1982, together with amendments to Section 1533 that imposed timetables for action by the Secretary on petitions to list threatened or endangered species. See Pub. L. No. 97-304, § 7(2), 96 Stat. 1425. The Senate Report accompanying the 1982 amendments explained that Section 1540(g)(1)(C) "would amend the citizen suit provision of the Act to authorize actions against the Secretary for failure to perform the acts and duties that are imposed by" other provisions of those amendments. S. Rep. No. 418,

states that an action under Section 1540(g)(1)(A) may not be brought "prior to sixty days after written notice of the violation has been given to the Secretary and to any alleged violator of any such provision or regulation," 16 U.S.C. 1540(g)(2)(A)(i), or if civil or criminal enforcement proceedings are ongoing, see 16 U.S.C. 1540(g)(2)(A)(ii) and (iii). The requirement that notice be given separately to the Secretary and to the "violator," and the bar on commencement of citizen suits during the pendency of federal enforcement proceedings, suggest that Section 1540(g)(1)(A) is directed at on-the-ground "violations" of the Act's substantive provisions—not at the Secretary's administration of the Act.²⁵ Thus, the "sense of the statute," cf. *Heckler v. Edwards*, 465 U.S. 870, 879 (1984), is that an erroneous biological judgment by the Service is

97th Cong., 2d Sess. 15 (1982). That language from the Senate Report reflects the assumption that the Secretary's failure to comply with the new statutory requirements governing the listing process would not otherwise be subject to challenge under the citizen suit provision.

²⁵ This conclusion is supported by two other textual features of 16 U.S.C. 1540(g)(1)(A). First, that Section provides for a suit against a person "who is alleged to be in violation" of a provision of the Act or regulations. The phrase "to be in violation" does not extend to allegations of past, completed actions. See *Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49, 57 (1987). Once the FWS furnishes a biological opinion to an action agency, its role in that consultation is completed. There is no ongoing conduct by which the FWS could be said to continue "to be in violation" of the Act. Second, Section 1540(g)(1)(A) states that the "person[s]" whose violations are covered include "the United States and any other governmental instrumentality or agency." Thus, in referring to "violations" by governmental agencies, the citizen suit provision refers to the agency itself, not the officer who is the head of the agency. See also 16 U.S.C. 1536(a)(2) (referring to the no-jeopardy obligation of each "Federal agency"). By contrast, the citizen suit provision uses the term "the Secretary" when referring to actions taken in administering the Act.

not the sort of "violation" that was intended to be cognizable under Section 1540(g)(1)(A).²⁶

ii. The historical development of the ESA and similar citizen suit provisions reinforces that conclusion. As noted above, see note 21, *supra*, a number of federal environmental statutes contain citizen suit provisions patterned after the Clean Air Amendments of 1970, Pub. L. No. 91-604, § 12(a), 84 Stat. 1706.²⁷ The pertinent Clean Air Act provision authorized citizen suits

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or

²⁶ The ESA also provides that decisions of the Endangered Species Committee granting or denying exemptions for proposed activities are subject to "judicial review, under chapter 7 of title 5." 16 U.S.C. 1536(n). That provision further supports the inference that administrative decisions concerning the implementation of the ESA are to be reviewed under the APA—subject to the terms and conditions (*e.g.*, the requirement of "final agency action") that the APA imposes—rather than under the citizen suit provision.

²⁷ The House Report accompanying the ESA stated that the language of Section 1540(g) as originally enacted was "parallel to that contained in the recent Marine Protection Research and Sanctuaries Act of 1972 [MPRSA], and is to be interpreted in the same fashion." H.R. Rep. No. 412, 93d Cong., 1st Sess. 19 (1973). The MPRSA provision was intended, in turn, to "parallel[] that adopted by the Congress * * * in the Clean Air Act." 117 Cong. Rec. 30,852 (1971) (statement of Rep. Dingell).

duty under this chapter which is not discretionary with the Administrator.

42 U.S.C. 1857h-2(a) (1970) (recodified as amended at 42 U.S.C. 7604(a)).²⁸

The text and history of the Clean Air Act make clear that suits against the Administrator challenging her implementation of that Act are not cognizable under Section 7604(a)(1). The Clean Air Act requires that challenges to the Administrator's actions be brought directly in the court of appeals, 42 U.S.C. 7607(b), and states that "[n]othing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section," 42 U.S.C. 7607(e). The legislative history

²⁸ Section 7604(a)(1) of the Clean Air Act, like Section 1540(g)(1)(A) of the ESA, specifically identifies the United States and other governmental entities as potential defendants in a citizen suit. The Senate Report accompanying the Clean Air Act explained that "Federal facilities generate considerable air pollution. Since Federal agencies have been notoriously laggard in abating pollution and in requesting appropriations to develop control measures, it is important to provide that citizens can seek, through the courts, to expedite the government performance specifically directed under" other provisions of the Act. S. Rep. No. 1196, 91st Cong., 2d Sess. 37 (1970). The inclusion of federal entities as permissible defendants in Section 7604(a)(1) suits thus reflects Congress's recognition that federal agencies' on-the-ground activities may place them "in violation of" applicable emission standards. It does not suggest that Congress conceived of errors by the EPA in its administration of the Act as "violations" within the meaning of Section 7604(a)(1). The same principle applies in the ESA context: Section 1540(g)(1)(A) citizen suits may properly be brought to prevent federal land management activities from jeopardizing listed species, for example, but not against the Secretary based on alleged errors in his administration of the Act, including the furnishing of biological opinions in the consultation process under Section 7.

confirms that citizen suits under the Clean Air Act may be brought against the Administrator only where the plaintiff alleges a failure to perform a nondiscretionary duty. See H.R. Conf. Rep. No. 1783, 91st Cong., 2d Sess. 56 (1970) ("Suits against the Administrator are limited to alleged failure to perform mandatory functions to be performed by him. Suits against violators, including the United States and other government agencies to the extent permitted by the Constitution, would also be authorized.").²⁹ The ESA citizen suit provision should likewise be construed not to apply to the Secretary's administration of the Act (except for the failure to perform nondiscretionary duties under Section 1533). Cf. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 682-683 n.1 (1983) (Court's interpretation of the word "appropriate" in Clean Air Act attorney's fee provision governs construction of parallel provisions in other environmental statutes).³⁰

²⁹ See also *Kennecott Copper Corp. v. Costle*, 572 F.2d 1349, 1353 (9th Cir. 1978) ("the nondiscretionary duty requirement imposed by [the Clean Air Act citizen suit provision] must be read in light of the Congressional intent to use this phrase to limit the number of citizen suits which could be brought against the Administrator"); *Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654, 663 (D.C. Cir. 1975) (purpose of nondiscretionary duty requirement was "to limit citizen suits against the Administrator to a chosen few").

³⁰ The ESA citizen suit provision concededly covers a broader range of "violations" than does the analogous provision of the Clean Air Act. Compare 16 U.S.C. 1540(g)(1)(A) (authorizing suit to enjoin "any person * * * who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof") with 42 U.S.C. 7604(a)(1) (authorizing suit "against any person * * * who is alleged to * * * be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation"). For three reasons, however, that change in language in the ESA does not reflect congressional intent to transform the citizen suit into an alternative

b. In light of the strong evidence that Section 1540(g)(1)(A) does not apply to the Secretary's administration of the Act *at all*, it would be particularly inappropriate to read that Section as an *unusually expansive* judicial review provision, permitting attacks on non-final action that would not be reviewable under the APA. As the courts of appeals have recognized, application of the ESA to federal defendants should be governed by traditional principles of administrative law. In determining whether an action agency's conduct complies with the substantive

mechanism for judicial review (outside the context of nondiscretionary duties) of the Secretary's administration of the Act.

First, other language in the ESA citizen suit provision itself—most notably the express authorization of suits to compel performance of nondiscretionary duties—reflects the premise that suits alleging secretarial errors in the administration of the Act would not be cognizable under Section 1540(g)(1)(A). See pages 39-40, *supra*. Second, the pertinent legislative history contains no evidence of congressional intent to depart from the scheme established in the Clean Air Act, whereby agency implementation of the statute was subject to challenge under the citizen suit provision only in cases involving failure to perform a nondiscretionary duty. To the contrary, that history indicates that Congress attempted to model subsequent citizen suit provisions after the Clean Air Act. See notes 21 and 27, *supra*.

Finally, the ESA citizen suit provision, although broader than the analogous section of the Clean Air Act, is not unique. Other environmental statutes contain broadly worded citizen suit provisions very similar to Section 1540(g)(1)(A), while containing separate provisions governing judicial review of agency administration. See, e.g., Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6972 (citizen suits), 6976 (judicial review); Safe Drinking Water Act, 42 U.S.C. 300j-8 (citizen suits), 300j-7 (judicial review); Toxic Substances Control Act, 15 U.S.C. 2619 (citizen suits), 2618 (judicial review); Noise Control Act of 1972, 42 U.S.C. 4911 (citizen suits), 4915 (judicial review). Those statutes indicate that Congress has not historically regarded errors by the implementing agency as "violations" of a statute within the meaning of the various citizen suit provisions.

no-jeopardy mandate of Section 7(a)(2), for example, a reviewing court should apply an arbitrary-and-capricious standard reflecting deference to agency expertise. The D.C. Circuit has explained:

Appellants in effect seek to have the trial court substitute its views regarding environmental impacts for those of the agencies which are charged with implementing the ESA. The Act provides no support for such a sweeping result. The citizen suit provision of the Act, relied on by appellants, merely provides a right of action to challenge the agency action alleged to be in violation of the Act or to compel agency compliance with the requirements of the Act. It does not direct trial courts to conduct *de novo* review in adjudicating such actions and we decline to read such a requirement into the Act.

Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678, 685 (D.C. Cir. 1982) (citation, footnote, and internal quotation marks omitted). The court concluded that "the appropriate standard of review under the ESA is the arbitrary and capricious standard provided by the APA." *Id.* at 686. Accord, e.g., *Sierra Club v. Yeutter*, 926 F.2d 429, 439 (5th Cir. 1991); *Environmental Coalition of Broward County v. Myers*, 831 F.2d 984, 987 (11th Cir. 1987); *Village of False Pass v. Clark*, 733 F.2d 605, 609 (9th Cir. 1984).

Similar reasoning applies to the instant case. The APA requirement of "final agency action," and the decisions of this Court applying principles of finality and ripeness, reflect considered judgments regarding the appropriate timing of legal challenges to the conduct of federal agencies. Nothing in the text or history of Section 1540(g)(1)(A) suggests an intent to depart from those background rules. Thus, even if Section 1540(g)(1)(A) is

construed to provide an alternative mechanism for judicial review of the Secretary's implementation of the ESA, it would not authorize a challenge to the non-final action at issue here.

C. Alternative Avenues Exist By Which A Court May Review Claims That The Service Has Recommended Unreasonably Severe Restrictions On The Use Of Natural Resources

A central theme of petitioners' argument is that if their current claims are not cognizable, there will be no avenue by which a court can review allegations that the Secretary has recommended unreasonably severe restrictions on the use of natural resources. That premise is incorrect. As we explain above, any actions taken by the Bureau in reliance upon the biological opinion are subject to judicial review at the behest of persons injured by them. Persons whose requests for water are denied as a result of the Bureau's adoption of the Service's recommendations would be appropriate plaintiffs to challenge the BOR's actions.³¹

³¹ As we explain in the text, plaintiffs may obtain vacatur of an action agency's decision by showing that it was based on a biological opinion that failed to satisfy the arbitrary-and-capricious standard of review. A plaintiff may not prevail, however, simply by persuading a court that the Service identified, or the Bureau adopted, alternatives to a proposed action that go beyond the minimum required to avoid jeopardy to listed species. As noted above, see page 3, *supra*, if the Service concludes that a proposed action is likely to jeopardize the continued existence of a listed species, its biological opinion must identify "reasonable and prudent alternatives" to the proposed action, or else state that no such alternatives exist. See 16 U.S.C. 1536(b)(3)(A); 50 C.F.R. 402.02, 402.14(h)(3). But the "reasonable and prudent alternatives" identified in a biological opinion need not embody the absolute minimum biological requirements needed to maintain the species on the razor's edge of survival and extinction. See 50 C.F.R. 402.02 (definition of "reasonable and prudent alternatives"). The

And in the course of reviewing the Bureau's conduct, the court can examine the biological opinion and the evidence on which it was based. In reviewing the scientific judgments embodied in the biological opinion, moreover, the court would employ the same arbitrary-and-capricious standard applicable to suits brought by environmental plaintiffs contending that actions taken in reliance upon a biological opinion were likely to jeopardize listed species.

Thus, the scientific judgments embodied in a biological opinion may be challenged in court within the context of a suit against an action agency, either by plaintiffs who allege that the opinion is insufficiently protective of listed species, or by plaintiffs who allege that the opinion recommends unreasonably severe constraints on the use of natural resources. The timing and standard of review would be the same in both contexts; the two types of actions would differ only in that they would rest on distinct jurisdictional bases. A plaintiff alleging that an action agency's conduct would jeopardize the continued existence of a listed species could invoke the citizen suit provision of the ESA. That provision identifies the United States and other governmental entities as potential defendants, see 16 U.S.C. 1540(g)(1)(A), and conduct by an action agency that would jeopardize a listed species is properly characterized as a "violation" of the Act. See, e.g., *TVA v. Hill*, 437 U.S. 153, 172, 174 (1978) (Court concluded that Tennessee Valley Authority would "be in violation of the Act if it completed and operated the Tellico

Service therefore does not engage in unlawful "over-regulation" (Pet. Br. 48) simply by identifying reasonable and prudent alternatives that go beyond the minimum steps necessary to avoid jeopardy, particularly in light of the action agency's duty to "insure" that its actions are not likely to jeopardize the species. 16 U.S.C. 1536(a)(2). Nor does an action agency violate the law simply by doing more to protect listed species than the Act requires. See pages 48-49, *infra*.

Dam as planned," because "TVA's proposed operation of the dam * * * [would cause] the eradication of an endangered species") (emphasis omitted).³²

Petitioners, by contrast, allege that the FWS's biological opinion recommends unreasonably severe limitations on the use of natural resources. If the BOR had denied petitioners' requests for water in reliance upon that opinion, petitioners could have challenged that denial, and could have obtained judicial review of the biological opinion in the course of their suit against the Bureau. The BOR's refusal to release the water would not constitute a violation of the ESA, however, even if it was premised on a biological opinion that was found to be arbitrary and capricious. Nothing in the ESA requires a federal resource management agency to permit the use of natural resources, or to authorize other activities, up to the point at which its actions will jeopardize the continued existence of a listed species.³³ Petitioners therefore could

³² In our view, the difficult "zone of interests" questions under the ESA citizen suit provision involve situations very far removed from the present one. Suppose, for example, that the owner of land adjacent to government property complained that logging on the federal land caused dust and noise and thereby hindered his enjoyment of his own land. He might contend in addition that the logging jeopardized the continued existence of an endangered bird species. The property owner might expressly disavow any personal interest in the fate of the bird but argue that he was nonetheless entitled to invoke the ESA citizen suit provision, on the ground that he had suffered injury in fact from the same government conduct that was alleged to violate the ESA. That allegation would surely satisfy Article III; the question is whether the fortuitous relationship between the landowner's injury and the values protected by the ESA would trigger the application of prudential standing requirements.

³³ To the contrary, the ESA requires all federal agencies to "utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and

not invoke the ESA citizen suit provision as the basis for a challenge to the Bureau's refusal to release additional water. Cf. *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152-153 (1908) (case is not one "arising under" federal law, within the meaning of a federal jurisdictional statute, where resolution of a state-law action turns on the merits of an anticipated federal defense). Rather, their suit would arise under the APA, or under any federal statute that was alleged to require that the water be released.³⁴

threatened species." 16 U.S.C. 1536(a)(1). The Act provides that "[t]he terms 'conserve', 'conserving', and 'conservation' mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." 16 U.S.C. 1532(3). The ESA thus contains an affirmative (albeit generalized) requirement that federal agencies should attempt to improve the condition of listed species, not simply avoid threats to their continued existence.

³⁴ The practical differences between an ESA citizen suit and an APA action are of modest significance. The plaintiff in an ESA citizen suit must generally give 60 days' notice prior to filing his complaint, see 16 U.S.C. 1540(g)(2)(A); the APA imposes no such requirement. On the other hand, an award of attorney's fees appears to be more readily available in a citizen suit than in an APA action. Compare 16 U.S.C. 1540(g)(4) ("The court * * * may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.") with 28 U.S.C. 2412(d)(1)(A) (absent a specific statutory provision governing attorney's fees, fees are to be awarded to a prevailing party in a suit against the United States under the Equal Access to Justice Act (EAJA) "unless the court finds that the position of the United States was substantially justified"); see *Pierce v. Underwood*, 487 U.S. 552, 563-568 (1988). EAJA fees may not be awarded, moreover, to prevailing parties who exceed the statute's limits on net worth and number of employees. See 28 U.S.C. 2412(d)(2)(B). In either an APA action or a citizen suit, however, the court will apply the same arbitrary-and-capricious stan-

CONCLUSION

The judgment of the court of appeals should be affirmed.
Respectfully submitted.

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JULY 1996

dard of review, giving deference to the scientific and technical judgments of the expert agencies. See pages 46-47, *supra*.

A suit under the APA challenging the Bureau's water allocation decisions would be governed by zone of interests principles, since the zone of interests test is "a gloss on the meaning of § 702" of the APA. *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 395 (1987). The inquiry would focus, however, on whether a potential plaintiff's claim fell within the zone of interests protected by federal statutes governing the Bureau's allocation of water. Petitioners would clearly satisfy that requirement.

APPENDIX

1. Section 1536 of Title 16 of the United States Code provides in pertinent part:

§ 1536. Interagency cooperation**(a) Federal agency actions and consultations**

* * * * *

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

* * * * *

(1a)

2. Section 1540 of Title 16 of the United States Code provides in pertinent part:

§ 1540. Penalties and enforcement

* * * * *

(g) Citizen suits

(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf—

(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; or

(B) to compel the Secretary to apply, pursuant to section 1535(g)(2)(B)(ii) of this title, the prohibitions set forth in or authorized pursuant to section 1533(d) or 1538(a)(1)(B) of this title with respect to the taking of any resident endangered species or threatened species within any State; or

(C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be. In any civil suit commenced under subparagraph (B) the district court

shall compel the Secretary to apply the prohibition sought if the court finds that the allegation that an emergency exists is supported by substantial evidence.

(2)(A) No action may be commenced under subparagraph (1)(A) of this section—

(i) prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation;

(ii) if the Secretary has commenced action to impose a penalty pursuant to subsection (a) of this section; or

(iii) if the United States has commenced and is diligently prosecuting a criminal action in a court of the United States or a State to redress a violation of any such provision or regulation.

(B) No action may be commenced under subparagraph (1)(B) of this section—

(i) prior to sixty days after written notice has been given to the Secretary setting forth the reasons why an emergency is thought to exist with respect to an endangered species or a threatened species in the State concerned; or

(ii) if the Secretary has commenced and is diligently prosecuting action under section 1535(g)(2)(B)(ii) of this title to determine whether any such emergency exists.

(C) No action may be commenced under subparagraph (1)(C) of this section prior to sixty days after written notice has been given to the Secretary;

except that such action may be brought immediately after such notification in the case of an action under this section respecting an emergency posing a significant risk to the well-being of any species of fish or wildlife or plants.

(3)(A) Any suit under this subsection may be brought in the judicial district in which the violation occurs.

(B) In any such suit under this subsection in which the United States is not a party, the Attorney General, at the request of the Secretary, may intervene on behalf of the United States as a matter of right.

(4) The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

(5) The injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Secretary or a State agency).

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CLERK

No. 95-813

In The
Supreme Court of the United States
October Term, 1995

BRAD BENNETT, et al.,

Petitioners,

vs.

MICHAEL SPEAR, et al.,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

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TABLE OF CONTENTS

	Page
INTRODUCTION.....	1
I. THE COMPLAINT AMPLY MEETS THE REQUIREMENTS FOR STANDING UNDER ARTICLE III	4
II. RESPONDENTS' STATUTORY INTERPRETA- TION ARGUMENTS SHOULD BE REMANDED TO THE LOWER COURTS	9
III. RESPONDENTS' PROPOSED SCHEME OF JUDI- CIAL REVIEW OF ESA ACTION IS FLAWED..	18

TABLE OF AUTHORITIES

Page

CASES

<i>Abbott Laboratories v. Gardner</i> , 387 U.S. 136 (1967)	18
<i>Adams Fruit Co. Inc. v. Barrett</i> , 494 U.S. 638 (1990)	13
<i>Babbitt v. Sweet Home Chapter of Communities</i> , 515 U.S. ___, 132 L.Ed.2d 597 (1995)	11
<i>Columbia Broadcasting System v. United States</i> , 316 U.S. 407 (1942)	18
<i>Connecticut National Bank v. Germain</i> , 503 U.S. 249 (1992)	13, 14
<i>Dalton v. Specter</i> , 511 U.S. ___, 128 L.Ed.2d 497 (1994)	16, 20
<i>Defenders of Wildlife v. Hodel</i> , 851 F.2d 1035 (8th Cir. 1988)	11
<i>Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding and Dry Dock Co.</i> , 514 U.S. ___, 131 L.Ed.2d 166 (1995)	15
<i>District of Columbia v. Greater Washington Bd. of Trade</i> , 506 U.S. 125 (1992)	12
<i>Dugan v. Rank</i> , 372 U.S. 609 (1963)	5
<i>Escondido Mutual Water Co. v. La Jolla Band of Mission Indians</i> , 446 U.S. 765 (1984)	6
<i>Fogerty v. Fantasy Inc.</i> , 510 U.S. ___, 127 L.Ed.2d 455 (1994)	18
<i>Franklin v. Massachusetts</i> , 505 U.S. 788, 120 L.Ed.2d 636 (1992)	16, 17
<i>Garcia v. United States</i> , 469 U.S. 70 (1984)	12, 16
<i>Harrison v. PPG Industries, Inc.</i> , 446 U.S. 578 (1980)	10

TABLE OF AUTHORITIES - Continued

Page

<i>International Primate Protection League v. Tulane Educational Fund</i> , 500 U.S. 72 (1991)	14
<i>Japan Whaling Assn. v. American Cetacean Society</i> , 478 U.S. 221 (1986)	12
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555, 119 L.Ed.2d 351 (1992)	<i>passim</i>
<i>Lujan v. National Wildlife Federation</i> , 497 U.S. 871 (1990)	4, 18
<i>Mackey v. Lanier Collection Agency & Service</i> , 486 U.S. 825 (1988)	14
<i>Madera Irr. Dist. v. Hancock</i> , 985 F.2d 1397 (9th Cir. 1993)	5
<i>Mausolf v. Babbitt</i> , 913 F.Supp. 1334 (D. Minn. 1996)	11
<i>Northeastern Fla. Chapter, Associated Gen. Contrac- tors of America v. Jacksonville</i> , 508 U.S. 656, 124 L.Ed.2d 586 (1993)	8
<i>Pilot Life Ins. Co. v. Dedeaux</i> , 481 U.S. 41 (1987)	12
<i>Regents of University of California v. Bakke</i> , 438 U.S. 265 (1978)	8
<i>Reynolds v. Int'l Amateur Athletic Federation</i> , 505 U.S. 1301 (1992)	9
<i>Rubin v. United States</i> , 449 U.S. 424 (1981)	12
<i>Sierra Club v. Morton</i> , 405 U.S. 727 (1972)	4
<i>Simon v. Eastern Kentucky Welfare Rights Org.</i> , 426 U.S. 26 (1976)	5
<i>Sullivan v. Everhart</i> , 494 U.S. 83 (1990)	2

TABLE OF AUTHORITIES – Continued

	Page
<i>Sullivan v. Hudson</i> , 490 U.S. 877 (1989)	13
<i>Swan View Coalition, Inc. v. Turner</i> , 824 F.Supp. 923 (D. Mont. 1992)	12
<i>Swift & Co. v. United States</i> , 276 U.S. 311 (1927)	9
<i>TVA v. Hill</i> , 437 U.S. 153 (1978)	10
<i>United States v. Gerlach Live Stock Co.</i> , 339 U.S. 725 (1949)	5
<i>United States v. Price</i> , 383 U.S. 787 (1966)	12, 15
<i>United States v. Storer Broadcasting Co.</i> , 351 U.S. 192 (1956)	18
<i>Westlands Water District v. United States</i> , 850 F.Supp. 1388 (E.D. Cal. 1994)	12

STATUTES

Administrative Procedure Act

5 U.S.C. 701	1
5 U.S.C. 706(2)(A)	11

Clean Air Act

42 U.S.C. 7604	15
42 U.S.C. 7604(a)(1)	15
42 U.S.C. 7607(e)	15

Endangered Species Act

16 U.S.C. 1531	1
16 U.S.C. 1531(c)(2)	8
16 U.S.C. 1532(13)	9

TABLE OF AUTHORITIES – Continued

	Page
16 U.S.C. 1533	13
16 U.S.C. 1533(b)(2)	8
16 U.S.C. 1536(a)(1)	19
16 U.S.C. 1536(a)(2)	8
16 U.S.C. 1536(b)(3)(A)	8
16 U.S.C. 1536(b)(1)(B)	10
16 U.S.C. 1540(g)(1)(A)	9, 10, 12, 13, 15, 18
16 U.S.C. 1540(g)(1)(C)	13, 14
16 U.S.C. 1540(g)(2)(A)	15
16 U.S.C. 1540(g)(5)	12, 14
Federal Power Act (16 U.S.C. 797(e))	6
50 C.F.R. 402.14(e)	10
50 C.F.R. 402.14(g)	19
50 C.F.R. 402.14(g)(5)	10
50 C.F.R. 402.14(h)	19
50 C.F.R. 402.14(j)	19
50 C.F.R. 402.14(l)(1)	16
51 Fed. Reg. 19926, 19934 (1986)	19
51 Fed. Reg. 19954	20
59 Fed. Reg. 61744	8

TABLE OF AUTHORITIES – Continued

Page

LEGISLATIVE MATERIALS

H.R. Rep. 412, 93d Cong., 1st Sess. 19 (1973)	12
H.R. Conf. Rep. No. 740, 93d Cong., 1st Sess. (1973)	12
H.R. Conf. Rep. No. 835, 97th Cong., 2d Sess. 20 . . . 13, 14	
H.R. Conf. Rep. 1804, 95th Cong. 2d Sess. 26 (1978)	13
S. Rep. 307, 93d Cong., 1st Sess. 11 (1973)	12
S. Rep. 418, 97th Cong., 2d Sess. 4	13, 14

OTHER

1973 U.S.C.C.A.A.N. (93 Stat.)	12
--	----

INTRODUCTION

Respondents' Brief on the Merits fails to offer any defense of the "zone of interest" rationale utilized by the Ninth Circuit in this case.¹ The brief also avoids both the zone of interest contentions advanced by the Government in the courts below (Gov't C.A. Br. 14-23; Gov't D.Ct.Rep.Br. 5-8) and the prudential standing questions upon which certiorari was granted by this Court.

Rather than defending the Ninth Circuit's reasoning, respondents try to bypass the questions in the petition for certiorari by arguing that the "proper disposition" of this case does not involve the application of zone of interest standing principles. (Res. Br. 15) To this end, they advance two arguments outside the scope of the questions upon which certiorari was granted; neither of which was resolved by the courts below: (1) that petitioners have failed to demonstrate Article III standing and (2) that, for reasons of statutory interpretation, petitioners' claims are not cognizable under the citizen suit provision of the Endangered Species Act ("ESA"). In addition, for the apparent purpose of deflecting the Court from the ESA, respondents also argue that a remedy may be available against federal "action agencies" under the Administrative Procedure Act ("APA") – although, they argue, no such remedy may be asserted against the Fish and Wildlife Service ("FWS") for its ESA activities. No such remedy exists in this case, they argue, because petitioners can point to no "final agency action" for purposes of an APA suit. The result of these arguments is that respondents would have the Court affirm the Ninth Circuit, albeit on different grounds, thus leaving the law of the circuit controlled by the

¹ Indeed, respondents appear to have conceded that the Ninth Circuit was wrong when it concluded that because petitioners have no standing under the Endangered Species Act (16 U.S.C. 1531 *et seq.*) they also lack standing under the Administrative Procedure Act (5 U.S.C. 701 *et seq.*). (Pet.App. 18) According to respondents' current position, plaintiffs such as petitioners *do* have a limited remedy under the APA against a federal "action agency" – although not in this case. (Res. Br. 46-49)

erroneous "zone of interest" analysis rendered below. Moreover, the chaotic split among the circuits on the applicability of prudential standing requirements to the ESA's citizen suit provision – which may have been a factor in the acceptance of this case for review – would remain unresolved.

Petitioners believe it is important to correct the law of the Ninth Circuit and to close the split which exists among the circuits on the application of zone of interest concepts to the ESA's citizen suit provision. This can occur, we believe, by reversing the Ninth Circuit for the reasons raised in petitioners' merits brief (Pet. Br. 17-44) – none of which are challenged by respondents. Petitioners also believe it is appropriate to address whether the present litigation presents a real "case or controversy" within the meaning of Article III of the Constitution. That issue was raised in respondents' opposition to certiorari (Cert. Opp. 9-11).

On the other hand, it would be *inappropriate* for the Court to attempt to resolve the statutory interpretation arguments in Part II of respondents' brief. None of the arguments raised therein are within the scope of the questions upon which certiorari was granted; none were resolved by the courts below and the half-page argument on cognizability of claims that appeared in respondents' opposition to certiorari (Cert. Opp. 11) failed to provide notice of the kinds of arguments respondents now attempt to present on the merits.² Accordingly, the Court should decline to address these issues in the first instance and, instead, remand for disposition by the courts below. (See, e.g., *Sullivan v. Everhart*, 494 U.S. 83, 95 (1990)) Such proceedings may, in fact, obviate the need to

² Nor was sufficient notice of respondents' arguments provided in the courts below. None of respondents' Part II arguments regarding the ESA's citizen suit provisions were raised in the district court. In the court of appeals, respondents *did* argue that the FWS cannot be sued for over-regulating for the benefit of endangered species (Gov't C.A. Br. 23-24) but provided no indication of the statutory interpretation contentions now raised in their merits brief.

give further consideration to the claims respondent has raised.³

Respondents' statutory interpretation arguments raise highly important and far-reaching questions of law whose resolution will have a substantial impact upon the administration of much of the nation's environmental legislation. In essence, respondents are striving to preclude citizen suit review of the discretionary activities of the agencies charged by Congress with responsibility for administering the ESA. As petitioners briefly explain herein, resolution of the statutory interpretation issues now raised by respondents is not nearly as easy or as uncomplicated as respondents would have the Court believe. Of equal importance, respondents' new arguments cannot receive a complete response by petitioners in the few pages available for that purpose in this necessarily brief reply.

Petitioners strongly suggest that this Court *not* attempt to resolve the statutory interpretation arguments which respondents have decided to raise in lieu of the "zone of interest" contentions they argued to the courts below. Instead, the Court should decide the standing issues resolved by the lower courts and upon which certiorari was granted and reverse the

³ For example, insofar as the Government argues that an APA claim is not cognizable because there is no "final agency action," petitioners can allege, in good faith, that the Bureau did, in fact, comply with the 1992 biological opinion at issue in this case. Thus, if the current allegation in the complaint that the Bureau "will abide" by the biological opinion (Pet.App. 32) and the Bureau's commitment on the record to doing so (Res. Br. 27-28, n. 14) are insufficient to establish "final agency action," petitioners would almost certainly be granted leave below to allege actual Bureau compliance. The Government's cognizability objection would thus be resolved as a factual matter in the district court.

Whether petitioners have alleged a cognizable ESA claim under section 1540(g)(1)(C) for breach of a nondiscretionary duty is also a pleading issue that should not come before this Court until opportunity for amendment has been exhausted, particularly since the Government makes no claim that a plaintiff can *never* allege the breach of a nondiscretionary Secretarial duty under section 7 of the ESA.

Ninth Circuit's decision. Upon remand, the lower courts can consider respondents' statutory interpretation arguments in the first instance.

I. THE COMPLAINT AMPLY MEETS THE REQUIREMENTS FOR STANDING UNDER ARTICLE III

A. Because this case was dismissed at the pleading stage, the allegations of injury needed to satisfy Article III are minimal. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 119 L.Ed.2d 351 (1992), the Court stated: "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presume that general allegations embrace those specific facts that are necessary to support the claim.' " (119 L.Ed.2d 351 at 364, see also, *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990)). Here, this modest obligation is met by petitioners' allegation that, "The restrictions on lake levels imposed in the Biological Opinion *adversely affect* plaintiffs by substantially reducing the quantity of available irrigation water." (Pet.App. 40, emphasis added) Not only does such language allege injury to petitioners themselves (*Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972)) it alleges that their injury results from respondents' conduct; viz, through restrictions on lake levels imposed in the biological opinion.

Respondents' assertion that petitioners must also raise allegations regarding the Bureau's allocation practices and the precise quantity of water they received as a result is, at best, premature. While it is reasonable to expect that "specific facts" will be set forth in affidavits in response to a summary judgment motion and that those facts will be "supported adequately by the evidence adduced at trial," (*Lujan v. Defenders of Wildlife*, *supra*, 119 L.Ed.2d at 365) this case is before the Court on a judgment of dismissal, not a summary judgment or judgment after trial. Petitioners have had no opportunity to produce affidavits much less conduct discovery regarding the Bureau's allocation practices. Moreover, respondents' related assumption that no cognizable injury, for Article III purposes, can arise from a reduction of water

supplies in the aggregate (Res. Br. 19) is simply incorrect. Not only has this Court found a reduction of water supply, in the aggregate, to be actionable (*Dugan v. Rank*, 372 U.S. 609, 623-25 (1963); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 752-54 (1949)); but even the Ninth Circuit has determined that the impairment of an irrigation district's aggregate contract right to water against the United States may amount to redressible injury capable of being asserted on behalf of the district's water users. (See *Madera Irr. Dist. v. Hancock*, 985 F.2d 1397, 1401 (9th Cir. 1993)).

B. Respondents argue, however, that the biological opinion did not "compel" the Bureau to operate the Klamath Project in accordance with minimum lake level restrictions and that even though the Bureau's operation is in accordance with the precise terms of the opinion, the "proximate cause" of petitioners' harm was a decision by the Bureau regarding the allocation of available water, not the biological opinion itself. (Res. Br. 22) For purposes of Article III standing, the issue is whether there is a "causal connection between the injury and the conduct complained of - the injury has to be 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.' " (*Lujan v. Defenders of Wildlife*, *supra* 119 L.Ed.2d 351, 364; *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)).

The biological opinion is instructive in this regard. It describes the "Mitigation Measures" which the Bureau itself proposed for the Klamath Project to promote "the survival and recovery of the endangered species that exist in the Project area." (Pet.App. 21-31) Not one of these measures involves the imposition of restrictions on lake levels. Instead, the concept of maintaining minimum levels in Gerber and Clear Lake reservoirs originated, in its entirety, from the Reasonable and Prudent Alternative ("RPA") developed by the FWS. (J.A. 88-90) When respondents concede (Res. Br. 27-28, n. 14) that the Bureau decided to modify its intended operation of the Project to conform to the RPA even before the case was filed, they effectively concede that the dispute herein is "fairly traceable" to the FWS.

The Bureau's acquiescence in the RPA is not difficult to understand. While respondents assert (Res. Br. 26, n. 13) that the RPA and the immunity from criminal and civil liability afforded the Bureau by the opinion's Incidental Take Statement are "separate and distinct" (apparently for the sole reason that the RPA appears at J.A. 86-92 while the Take Statement appears at J.A. 92-96) they fail to mention that the Take Statement was described by the FWS itself as a statement of "Incidental Take *Under Reasonable and Prudent Alternative*." (J.A. 92, emphasis added) Not surprisingly, respondents also concede that, "as a practical matter" action agencies are unlikely to risk criminal and civil penalties by deviating from the take statement (Res. Br. 26, n. 13) and that they "very rarely" choose to engage in conduct determined by the FWS to cause jeopardy to a listed species (*Id.*, 21). In fact, respondents fail to cite even a single example of action agency deviation from the terms of a biological opinion – hardly the track record one would expect of a truly "independent" third party.

Nonetheless, in pursuit of their "independent" action agency theory, respondents propose to bar all future direct challenges to biological opinions issued by the FWS. (Res. Br. 22-24) Instead, only litigation against "action agencies" would be allowed, with the "rationality" of the FWS' biological analysis tested indirectly through a judicial determination of the propriety of the action agency's decision to proceed in reliance upon the opinion. (*Id.*) In short, an agency without notable biological expertise would be required to defend a biological opinion which it did not author, with which it may harbor internal disagreement and for which it was provided only a truncated administrative record (Res. Br. 24, n. 12). This convoluted process would not further Article III's purpose of ensuring real "cases or controversies".⁴

⁴ Such a result is certainly not mandated by *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 446 U.S. 765 (1984) (Res. Br. 23, n. 11). Not only was *Escondido* driven by the specific procedures mandated by Congress in Section 4(e) of the Federal Power Act (16 U.S.C. 797(e))

C. Respondents also argue that the injury suffered by petitioners will not be redressed by a favorable judicial ruling. (Res. Br. 26-29) More specifically, they assert that it is "purely speculative whether a judicial order running against the FWS would enable petitioners to obtain additional water." (*Id.*, 27) In essence, their contention is that even if the courts overturn the minimum reservoir level restrictions in an action brought against the FWS, the Bureau itself could simply decide to re-operate the Klamath Project in accordance with such restrictions. These contentions are wide of the mark in several respects.

First, the Bureau has already indicated how it would operate the Klamath Project in the absence of the biological opinion. While some 20 mitigation measures would be employed to protect endangered species, *none* would entail operating the Project to minimum reservoir levels. (J.A. 21-31) Further, any judicial order that is issued would not run simply against the FWS. The Complaint herein also names the Secretary of Interior as a defendant. If, as respondents contend, an action against the Secretary also binds the FWS (Res. Br. 24, n. 12) then such an action would be equally binding upon the Bureau – a co-equal agency within the Department of Interior, that also reports to the Secretary. In short, the notion that the Bureau would simply elect to operate in accordance with restrictions it had never before proposed and which had been invalidated in an action binding upon the Secretary is, itself, nothing more than doubtful speculation.

Equally dubious is respondents' assertion that, to satisfy Article III requirements, petitioners must demonstrate that a judicial order running against the FWS would enable them to obtain more water. According to the Ninth Circuit, petitioners are in competition (with the fish) for the limited water supplies available in Gerber and Clear Lake reservoirs. (Pet.App.

but the Court's rationale – that the Commission had no discretion to change the conditions set by the Secretary of the Interior (466 U.S. at 778) is flatly inconsistent with respondents' argument regarding the powers of an "action agency" under the provisions of the ESA.

16) In such circumstances, it is not necessary for petitioners to show they would obtain more *water* but for the biological opinion; instead, it is enough to show that if the FWS follows the law by considering the economic consequences of its actions, petitioners will be in a better position to *compete* for the limited water available. (*Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville*, 508 U.S. ___, 124 L.Ed.2d 586, 597 (1993); *Regents of University of California v. Bakke*, 438 U.S. 265, 280- 81, n. 14 (1978)). Here, the legislative history of the amendments which added the economic balancing obligations invoked by petitioners indicates they were incorporated into the ESA precisely for the purpose of providing a more level playing field when consultations are undertaken and critical habitat determinations are made. (See Pet. Br. 32, 38)

Finally, it is significant that each of the claims asserted by petitioners is in the nature of a procedural right. Petitioners have a right to protect their contract-based interest in the Klamath Project by requiring respondents to undertake procedures which involve: (1) consideration of the economic impact of designating critical habitat⁵ (16 U.S.C. 1533(b)(2)); (2) consideration of the economic feasibility of an RPA in the event of a jeopardy finding (16 U.S.C. 1536(b)(3)(A)); (3) the use of scientific data in fulfilling the consultation requirement (16 U.S.C. 1536(a)(2)); and (4) the resolution of water resource issues in concert with the conservation of endangered species (16 U.S.C. 1531(c)(2)). As recognized in

⁵ Respondents assert that the obligation of the Secretary to take economic impacts into consideration when specifying critical habitat applies only to the "official designation" of critical habitat pursuant to Section 4 of the ESA. (Res. Br. 38 n. 23) Nowhere does the Act make such a distinction. Moreover, since the "official designation" of critical habitat for the Lost River and shortnose suckers cited by respondents (59 Fed. Reg. 61744) is constructed around the same minimum reservoir level concept found in the biological opinion, respondents' assertion is nothing more than an invitation to authorize the Secretary to do in a biological opinion that which he could *not* do otherwise; viz, designate critical habitat unaccompanied by the burden of an economic balancing procedure.

Lujan, *supra*, these procedural rights are special and may be asserted *without* meeting the standards for redressibility normally applicable under Article III. (119 L.Ed.2d 351, 372 n. 7)⁶

II. RESPONDENTS' STATUTORY INTERPRETATION ARGUMENTS SHOULD BE REMANDED TO THE LOWER COURTS

A. Respondents' argument that the citizen suit provision of the ESA only authorizes suits against *regulated parties* (i.e., federal "action agencies" or private parties) but not *regulators* like the FWS or the Secretary, is contrary to the plain language of the citizen suit provision itself. Section 1540(g)(1)(A) authorizes suit against, "*any person*, including the United States and any other governmental instrumentality or agency." (Emphasis added) In turn, the Act defines "person" to include "*any officer, employee, agent, department or instrumentality of the Federal Government*." (16 U.S.C. 1532(13), emphasis added) Thus, the FWS and the Secretary fall within the literal scope of the "persons" subject to suit under the ESA.

The ESA's citizen suit provision also does not distinguish between the *types* of violations which may be redressed.

⁶ Respondents assert three reasons for the inapplicability of *Defenders of Wildlife* footnote 7 standing to the present case. (Res. Br. 29, n. 15) Two of these involve Article III standing considerations ("independent action by a third party not before the court" and "injury in fact") already responded to hereinabove. The third reason is the contention that petitioners should be required to assert their procedural challenges only after the Bureau has made its final decision regarding the allocation of Klamath Project water. Here, however, petitioners did *not* commence this litigation until *after* the Bureau had already indicated its intent to abide by the provisions of the biological opinion. (Res. Br. 27, n. 14) If respondents are asserting that petitioners must delay seeking injunctive relief until after they have already suffered harm, the law of this Court is decidedly to the contrary. (E.g., *Swift & Co. v. United States*, 276 U.S. 311, 326 (1927); *Reynolds v. Int'l Amateur Athletic Federation*, 505 U.S. 1301 (1992) (Opn. of J. Stevens, Circuit Judge, staying court of appeals decision denying relief).

Instead, the statute simply provides that persons may be sued who are "in violation of *any* provision of this chapter or regulation thereunder." (16 U.S.C. 1540(g)(1)(A), emphasis added)⁷ Thus, respondents' suggestion that "enforcement" violations but not "implementation" violations are covered by the citizen suit provision (Res. Br. 39) finds no support in the statutory language. (See, *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 589 (1980), statute authorizing judicial review of "any other final action" means "exactly what it says, namely, *any other* final action." (Emphasis in original)) Moreover, since Congress also authorized suit for the violation of any ESA "regulation" (16 U.S.C. 1540(g)(1)(A)) and since agency regulations invariably concern the administration and implementation of the regulatory statute, the language of the citizen suit provision, itself, rebuts respondents' artificial distinction between implementation and enforcement violations.⁸

Applying respondents' proposed cognizability distinctions also leads to anomalous distortions of the statutory language. For example, when the FWS is an "action agency," it could be sued under section 1540(g)(1)(A) according to respondents, but not when the FWS acts as the administrator

⁷ The Government's concession that "[c]onduct by the Secretary that is inconsistent with [ESA] provisions might in a sense be said to constitute a 'violation' of the Act or regulations," (Res. Br. 39) is an understatement. That is the *common sense* understanding of to be "in violation of." (Cf. *TVA v. Hill*, 437 U.S. 153, 168, 172-174 (TVA "in violation of" section 7 of the ESA by not taking action to avoid jeopardy to endangered species as required by section 7))

⁸ The Secretary has adopted regulations governing section 7 interagency consultation. (50 C.F.R. sections 402.01-.16) Section 7 and these regulations confer rights upon private permit applicants against the FWS. See, e.g., 16 U.S.C. 1536(b)(1)(B); 50 C.F.R. sections 402.14(e), 402.14(g)(5). Under the Government's interpretation, the violation of a section 7 regulation *by the FWS* would be exempt from the citizen suit provision but the violation of a section 7 regulation *by an "action agency"* would be cognizable under section 1540(g)(1)(A) even though the statutory language authorizes suit for the violation of "any" regulation.

of the ESA. Thus, the FWS would sometimes be a "person" under the citizen suit provision and sometimes not. Similarly, respondents admit that the Secretary's violation of section 7 requirements would be subject to APA review under 5 U.S.C. 706(2)(A). One basis for invalidating agency action under section 706(2)(A) and thus establishing "arbitrary and capricious" administrative conduct, is to show that the agency action is "not in accordance with law;" i.e., that it violates the ESA. Thus, under respondents' argument, the Secretary's violation of the ESA would constitute action "not in accordance with law" for purposes of APA review, but not action "in violation of" the ESA for purposes of the ESA's citizen suit provision. Whether one focuses on the "any person" or "in violation of any provision" language of the citizen suit provision, the judicial review scheme proposed by respondents makes a shambles of the statutory language.

Significantly, prior suits alleging that Secretarial violations of the ESA's administration are cognizable and remediable under the citizen suit provision, have not been questioned. For example, in *Babbitt v. Sweet Home Chapter of Communities*, 515 U.S. ___, 132 L.Ed.2d 597 (1995) and *Lujan v. Defenders of Wildlife*, *supra*, the citizen suit provision was used as a vehicle for challenging the Secretary's adoption of regulations implementing section 7 (*Lujan*) and section 9 (*Sweet Home*). Neither the Government nor this Court raised any concern that such challenges to the Secretary's administration of the ESA were not cognizable under the plain meaning of the citizen suit provision.

⁹ See *Lujan*, *supra*, 504 U.S. 555, 571-572; *Defenders of Wildlife v. Hodel*, 851 F.2d 1035, 1037-1038 (8th Cir. 1988) (describing section 1540(g)(1)(A) claim that the Secretary violated section 7(a) in adopting the regulation at issue in *Lujan*); Joint Appendix in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, No. 94-859, at 17, ¶ 2; 24-26 (complaint allegations), 30 ¶ 2 (Government's answer admitting jurisdiction under the ESA citizen suit provision, 16 U.S.C. section 1540(g)). Other citizen suits have been brought under section 1540(g)(1)(A) alleging that FWS biological opinions have been issued in violation of the ESA. (See *Mausolf v. Babbitt*, 913 F.Supp. 1334, 1344 (D.

Ordinarily, one should "give [] effect to the 'deliberately expansive' language chosen by Congress," (*District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 129 (1992), quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987)) and "accord it a sweep as broad as its language." (*United States v. Price*, 383 U.S. 787, 801 (1966)). "[O]nly the most extraordinary showing of contrary intentions [from the legislative history] would justify a limitation on the 'plain meaning' of the statutory language." (*Garcia v. United States*, 469 U.S. 70, 75 (1984); see, also, *Rubin v. United States*, 449 U.S. 424, 430-31 (1981)). In this regard, it is important to recognize that section 1540(g)(1)(A) was part of the original 1973 ESA legislation and there is nothing in the legislative history indicating any intent to exclude Secretarial or FWS violations of the ESA from the broad scope of the citizen suit language.¹⁰ Nor is there any evidence that APA review of Secretarial action was intended to substitute for suits against the Secretary under the ESA.¹¹

Minn. 1996); *Swan View Coalition, Inc. v. Turner*, 824 F.Supp. 923, 929 (D. Mont. 1992); *Westlands Water District v. United States*, 850 F.Supp. 1388, 1424 (E.D. Cal. 1994))

¹⁰ House Report 412 said only that the citizen suit provision authorized suits "to enforce the provisions" of the ESA, and allowed injunctive relieve "for violations or potential violations of the Act." (See H.R. Rep. 412, 93d Cong., 1st Sess. 19 (1973); see, also, S. Rep. 307, 93d Cong., 1st Sess. 11 (1973) (citizen suits permit "private actions to enforce the provisions of this Act.")).

¹¹ The 1973 Conference Committee rejected provisions of the Senate bill which provided for modified APA procedures and judicial review. (See H.R. Conf. Rep. No. 740, 93d Cong., 1st Sess. (1973); 1973 U.S.C.C.A.A.N. (93 Stat.) 3003-4) Instead, the Conference Committee included some of those APA-type procedures in section 4 of the ESA, and adopted the House approach of making no reference to APA review in the legislation thereby permitting APA review by default. (*Id.*; see also, *Japan Whaling Assn. v. American Cetacean Society*, 478 U.S. 221, 231 n. 4 (1986). The 1973 legislation also included a "savings clause" in 16 U.S.C. 1540(g)(5) which provides that injunctive relief under the citizen suit provision shall not restrict remedies under any other statute or the common

Thus confronted with an unsupportive legislative history, respondents attempt to narrow the scope of the citizen suit language of section 1540(g)(1)(A) enacted in 1973, by pointing to the purportedly negative implications to be drawn from other ESA provisions added to the ESA after 1973. Such negative implications, however, are a weak basis for disregarding the plain meaning of a statute. (See *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *Adams Fruit Co. Inc. v. Barrett*, 494 U.S. 638, 644-45 (1990); *Sullivan v. Hudson*, 490 U.S. 877, 891-92 (1989)). The fact that section 1540(g)(1)(C) was subsequently added to the ESA in 1982 to ensure judicial review of nondiscretionary acts or duties of the Secretary under section 4 (16 U.S.C. 1533) hardly indicates that Congress intended it to be the exclusive means by which to challenge Secretarial violations of the ESA.¹² Section 1540(g)(1)(A) is a broad provision

law "including relief against the Secretary." Thus, while Congress was aware that APA review would be available, there was no intent to restrict the scope of section 1540(g)(1)(A) because of any supplemental APA remedies; instead, the "savings clause" indicates an intent to preserve multiple avenues of judicial review, including ones against the Secretary.

¹² The 1982 ESA amendments imposed nondiscretionary deadlines for listing and other actions by the Secretary under section 4. Previously, there were no deadlines for such actions, and consequently the timing of such action was purely "discretionary" with the Secretary. (See H.R. Conf. Rep. No. 835 97th Cong., 2d Sess. 20 (amendments "replace the Secretary's discretion with mandatory, nondiscretionary duties") Section 1540(g)(1)(C) simply ensured that these nondiscretionary deadlines would be judicially enforced. (See S. Rep. 418, 97th Cong., 2d Sess. 4 ("by imposing upon the Secretary a mandatory, nondiscretionary duty to make and publish decisions . . . to list or delist, [the bill] would force judicially reviewable action") Congress may have chosen not to rely upon the existing section 1540(g)(1)(A) as a means of judicial enforcement simply to avoid any uncertainty whether the Secretary's failure to act constituted action "in violation of" the ESA under section 1540(g)(1)(A). (Cf. H.R. Conf. Rep. 1804, 95th Cong. 2d Sess. 26 (1978) (1978 amendment clarifying language in the penalty provisions of the ESA "to make it clear that [the act's] sanctions apply to violations involving an omission or failure to act as well as to violations involving the commission of a

covering *any* violations of the ESA or its regulations by *any* government official, whereas section 1540(g)(1)(C) is more narrowly targeted at the nondiscretionary acts and duties of the Secretary under section 4 of the Act. Any partial overlap between the two provisions has little significance. Redundancy is only an issue when two statutes enacted at the same time are rendered duplicative. (*Mackey v. Lanier Collection Agency & Service*, 486 U.S. 825, 839, n. 14 (1988)). A partial overlap between statutes enacted at different times is understandable because "[r]edundancies across statutes are not unusual events in drafting." (*Connecticut National Bank*, *supra*, 503 U.S. at 253). In such circumstances, the primary canon of statutory construction is *not* the avoidance of redundancy but giving effect to the plain meaning of the language used (*Id.*, at 253-54) particularly where, as here, any redundancy can be explained by uncertainty over the coverage of different statutes. (See, *International Primate Protection League v. Tulane Educational Fund*, 500 U.S. 72, 81-82 (1991)).¹³

When Congress intended for judicial review of ESA administrative activity to take place exclusively under the

prohibited act"). Moreover, contrary to the Government's narrow reading of the scope of section 1540(g)(1)(C), the legislative history indicates that review of "nondiscretionary acts" under section 4 would include review of the sufficiency of the scientific evidence upon which section 4 decisions were based. (See H.R. Conf. Rep. No. 835, *supra*, at 21, 23; S. Rep. No. 418, *supra*, at 13-14).

¹³ The Government's own argument also fosters redundancy because a litigant could challenge the Secretary's failure to comply with a nondiscretionary section 4 duty under both section 1540(g)(1)(C) and the APA. Even more importantly, Congress, in section 1540(g)(5) ensured duplicative judicial remedies when it expressly provided that ESA injunctive relief would not preclude a litigant from pursuing any other relief "including relief against the Secretary" under any other statute or the common law. Any marginal redundancy between sections 1540(g)(1)(A) and 1540(g)(1)(C) should not be a vice when Congress made such redundancy a virtue in section 1540(g)(5), and when the Government's own scheme of judicial review *assumes* such redundancy.

APA, it knew how to say so. Thus, for example, in section 1536(n), Congress provided for APA review in the courts of appeal of exemption decisions by the Endangered Species Committee. This specialized judicial review provision suggests that if Congress had intended *other* administrative actions under the ESA to be subject exclusively to APA and not citizen suit enforcement, it would have specifically so provided. Respondents' attempted analogy to the citizen suit provision of the Clean Air Act (42 U.S.C. 7604) relies on language found in the Clean Air Act which is not present in the Endangered Species Act. Unlike the ESA, the Clean Air Act *specifies* that the administrator's implementation of the Act *should not be subject to judicial review via the citizen suit provision*. (See 42 U.S.C. 7607(e)). Because the ESA contains no comparable provision, the opposite inference is appropriate for the ESA.¹⁴ (See *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding and Dry Dock Co.*, 514 U.S. ___, 131 L.Ed.2d 166, 169-70 (1995)).

Importantly, respondents offer no *policy* reasons why Secretarial violations of the ESA should not be covered by the citizen suit provision. Instead, they concede that essentially the same type of review would be available under the APA. Because the dispute here is uncomplicated by any policy concerns, we thus end where we began: with the plain language of a citizen suit provision which says that "any person" can sue "any person," including government officials, who are in violation of "any provision . . . or regulation" of the ESA. The Court should not "seek ingenious analytical instruments" to read exemptions into this broad language. (*Price*, *supra*, 383 U.S. at 801)¹⁵ Nor should it narrow the plain

¹⁴ In addition, the Clean Air Act citizen suit provision also specifies the particular types of violations covered by the provision. (See 42 U.S.C. 7604(a)(1)) By contrast, section 1540(g)(1)(A) of the ESA is much broader and allows suit for violations of "any" ESA provision or regulation.

¹⁵ For example, contrary to respondents' suggestion, the fact that the 60-day notice provision in section 1540(g)(2)(A) provides for notice to

meaning of this language on the basis of some "gestalt judgment" about Congress' conceivable intent. (*Garcia, supra*, 469 U.S. at 78)

B. Respondents' companion argument that the FWS' biological opinion is not subject to APA review until the Bureau issues a final water allocation decision for the Klamath Project, goes well beyond any "finality" requirement in this Court's cases, including *Franklin v. Massachusetts*, 505 U.S. 788, 120 L.Ed.2d 636 (1992) and *Dalton v. Specter*, 511 U.S. ___, 128 L.Ed.2d 497 (1994). The "core question" for finality is two-pronged: "whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." (*Franklin, supra*, 120 L.Ed.2d at 648) Both requirements are satisfied in this case.

First, there is no question that the FWS took final action on the biological opinion, thereby concluding the section 7 consultation requested by the Bureau. (See 50 C.F.R. 402.14(l)(1)) Moreover, even assuming the Bureau was not "legally obligated" by the terms of the ESA to automatically comply with the biological opinion, the Bureau, in fact, made a decision to do so. (See Res. Br. 27-28, n. 14) Once the Bureau committed to comply with the biological opinion, the decisionmaking process on the biological opinion was final as to *both* the FWS and the "action agency," the Bureau. This fact distinguishes the present case from *Franklin* and *Dalton, supra*. In both of those cases there was a second decision-maker (the President) who had not yet decided whether to adopt the decision or follow the recommendation made by a subordinate agency, and who retained authority to change or

both the Secretary and "any . . . violator" does not mean that the Secretary or the FWS cannot be a "violator." The notice provision was simply drafted to be inclusive and to cover the situation where the violator is someone other than the Secretary. Where, as here, it is the FWS' conduct which is at issue, separate 60-day notices would be sent to the Secretary and to the particular Fish and Wildlife Service official who was the actual "violator" who approved the biological opinion or engaged in the particular section 7 consultation being challenged. (Sec. J.A. 2)

modify the agency decision or recommendation. Here, on the other hand, the Bureau has already made a definitive decision, on the record, to abide by the biological opinion. Any later water allocation decision necessarily *assumes* compliance with the opinion and *then* factors in other variables – such as how much precipitation occurred or is projected, current water storage, priorities among contractors, etc. Thus, insofar as the biological opinion was concerned, the decisionmaking process was complete, and the first prong of *Franklin* satisfied, once: (1) the FWS issued its biological opinion in final form and (2) the Bureau committed to comply with it.

The second *Franklin* prong – whether the result of the decisionmaking process will directly affect petitioners – is also satisfied. How much water a particular contractor will receive from the Klamath Project depends upon a number of factors. For example, whether a year is wet or dry will affect not only the amount of water that a contractor receives, but may also determine whether an allocation decision might be modified during the course of the season. However, once the Bureau committed to complying with the biological opinion, it became certain, at that moment, that *part* of the water in the Project would be allocated *first* to the endangered fish rather than anyone else. The Bureau's commitment to implement the biological opinion meant that specified "minimum pools" of water would be left in Gerber and Clear Lake reservoirs for the fish and that the Project's contractors would only have a claim to the water remaining *after* these minimum pools were established. The fact that the Bureau would make a later water allocation decision for each contractor based on additional factors (such as the amount of precipitation, storage and priority) does not change the fact that once the Bureau committed to the biological opinion, petitioners suffered an immediate and direct injury: whatever amount of water nature bestowed upon southern Oregon, a significant portion would automatically go "off the top" to the fish, and everyone else would divide only what was left.

This Court has applied the doctrine of finality in a pragmatic fashion and found agency action to be final even when further administrative steps in enforcement or implementation

need to be taken. (See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149-152 (1967); (*United States v. Storer Broadcasting Co.*, 351 U.S. 192, 198-199 (1956); *Columbia Broadcasting System v. United States*, 316 U.S. 407, 417-421 (1942). Utilizing a similar approach in the present case, there is simply no question that the decisionmaking process regarding the biological opinion was complete and that there was an immediate and direct practical impact on the amount of water that petitioners could ever hope to receive from the Klamath Project.

III. RESPONDENTS' PROPOSED SCHEME OF JUDICIAL REVIEW OF ESA ACTION IS FLAWED

Respondents' proposed scheme of judicial review of ESA action has three main flaws. First, respondents give economic interests or resource-user plaintiffs the same disfavored status that such litigants receive under the Ninth Circuit's decision, only respondents do so via their construction of section 1540(g)(1)(A) rather than through a "zone of interest" test. According to respondents, environmental plaintiffs complaining about *underregulation* under the ESA are free to sue "action agencies" under the citizen suit provision, section 1540(g)(1)(A), but resource users complaining of *overregulation* under the ESA have no remedies under section 1540(g)(1)(A) and can only sue under the APA. A similar attempt to take "party-neutral" statutory language and create a dual standard for different classes of litigants was rejected in *Fogerty v. Fantasy Inc.*, 510 U.S. ___, 127 L.Ed.2d 455 (1994).

Respondents say that resource users are not disfavored because they have an APA remedy, and would fall within the zone of interests protected by the relevant *resource* statute (here, the Reclamation Act of 1902). (Res. Br. 50, n. 34) But the relevant statute for purposes of the APA "zone" test is the ESA – "whose violation is the gravamen of the complaint" (*Lujan v. National Wildlife Federation*, *supra*, 497 U.S. 871, 886) – not the Reclamation Act. Under the Ninth Circuit's holding in this case, resource users, like petitioners, do *not*

fall within the zone of interests of the APA. Therefore, unless the Ninth Circuit's ruling in this case is *reversed* petitioners will have no remedy at all under the APA. Respondents' assurance that resource users will always have a viable APA remedy is thus a false promise.

Second, respondents argue that the FWS can never "overregulate" because even if reasonable and prudent alternatives in a biological opinion go beyond what is needed to avoid jeopardy, federal agencies still have a duty under section 7(a)(1) (16 U.S.C. section 1536(a)(1)) to conserve endangered species; therefore, there is nothing wrong with "overprotective" species regulation. (Res. Br. 46-49, and n. 33) This argument is contrary to the statute, the section 7 regulations, and the position that FWS took when it adopted its section 7 regulations. The duty to avoid jeopardy in section 7(a)(2), and the duty to conserve species in section 7(a)(1) are two separate and distinct duties under the ESA. Biological opinions and reasonable and prudent alternatives apply *solely* to the duty to avoid "jeopardy" under section 7(a)(2), not the duty to conserve species under section 7(a)(1). If the FWS finds that a proposed agency action will not jeopardize species, FWS cannot specify as RPAs various "conservation" measures which might help species. That is why the section 7 regulations distinguish between "conservation recommendations" – which are purely voluntary and separate from RPAs (50 C.F.R. section 402.14(j)) – and RPAs which are based on the jeopardy standard. (*Id.*, sections 402.14(g), (h)).¹⁶

¹⁶ When it adopted its section 7 regulations, the FWS rejected comments urging it to use biological opinions to promote species conservation goals. (51 Fed. Reg. 19926, 19934 (1986) ("The Service will not, nor does it have the authority to, mandate how or when other Federal agencies are to implement their responsibilities under section 7(a)(1), nor is the Service authorized to issue a biological opinion under section 7(a)(1) of the Act."); *id.*, ("The commenters' argument would require Federal actions to halt if they failed to conserve listed species, a result clearly not intended by Congress. Congress intended that actions that do not violate section 7(a)(2) . . . be allowed to proceed."); *id.*, ("the Service lacks authority to issue biological opinions under [section 7(a)(1)], and the Act does not

Finally, respondents' notion that the FWS can only be brought into section 7 ESA litigation indirectly through the device of suing the "action agency" rather than the FWS, is needlessly complex. Since the validity of the FWS' biological opinion, its administrative record, and its alleged expertise are in issue, the FWS should be a named party under ordinary principles of administrative law. Certainly when the FWS is alleged to have committed *procedural* violations, it is hard to see why the action agency is "vicariously" responsible for such violations. (See *Dalton, supra*, 128 L.Ed.2d 497) Ironically, while respondents say that there is no need to name the FWS in order to obtain full review of the FWS' biological opinion, they insist that *not* naming the Bureau as a defendant is a fatal flaw even though the Bureau's superior, the Secretary of the Interior, is a named defendant. Respondents' arcane scheme of who needs to be named as a defendant and who does not appears to be based less on traditional principles of administrative law, and more on achieving a particular result in this case.

Dated: August 14, 1996

Respectfully submitted,

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mandate particular actions to be taken by Federal agencies to implement 7(a)(1)")). In commenting on the proposed regulations, the House Committee on the Merchant Marine and Fisheries emphasized that conservation recommendations should be strictly voluntary and separate from a biological opinion, (51 Fed. Reg. 19954), and the FWS agreed: (*Id.*)

10
No. 95-813

Court, U.S.
MAY 22 1996

IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

BRAD BENNETT, *et al.*,

Petitioners,

v.

MARVIN PLENERT, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

**BRIEF AMICUS CURIAE OF THE
AMERICAN FOREST & PAPER ASSOCIATION,
AMERICAN PETROLEUM INSTITUTE,
NORTHWEST FOREST RESOURCE COUNCIL, AND
SOUTHERN TIMBER PURCHASERS COUNCIL,
IN SUPPORT OF PETITIONERS**

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QUESTIONS PRESENTED

Amici will address the following questions:

1. Does § 11(g) of the Endangered Species Act ("ESA") -- which authorizes citizen suits by "any person" for "any" alleged "violation" of the ESA and provides that the "district courts shall have jurisdiction" over any such suit, 16 U.S.C. § 1540(g) -- provide standing to its Article III jurisdictional limits and thereby eliminate prudential barriers to standing, such as the "zone of interests" test, which applies to actions brought under the Administrative Procedure Act?
2. Is an ESA § 7, 16 U.S.C. § 1536, biological opinion subject to judicial review, at least when a federal agency takes action in conformance with that opinion?
3. Can a biological opinion violate constraints in ESA § 7, so that there are potentially viable grounds for an ESA § 11(g) citizen suit brought by an economically-injured person?

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iv
STATUTORY AND REGULATORY PROVISIONS . . .	1
INTEREST OF AMICI CURIAE	2
SUMMARY OF THE ARGUMENT	5
ARGUMENT	6
I. THE ESA'S CITIZEN SUIT PROVISION ELIMINATES PRUDENTIAL STANDING BARRIERS	8
II. RESPONDENTS' ALTERNATIVE ESA ARGUMENTS LACK MERIT	18
A. Biological Opinions Are Subject To Judicial Review	20
B. There Are Viable Claims That ESA § 7 Has Been Violated By Over-Regulation . .	24
CONCLUSION	30

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<i>Alvarez v. Longboy</i> , 697 F.2d 1333 (9th Cir. 1983) . . .	16
<i>Association of Data Processing Serv. Orgs., Inc. v. Camp</i> , 397 U.S. 150 (1970) . .	10, 11, 29
<i>Babbitt v. Sweet Home Chapter of Communities for a Great Oregon</i> , 115 S.Ct. 2407 (1995)	4, 5, 11, 13, 14, 29
<i>Bangor Hydro Electric Co. v. FERC</i> , 78 F.3d 659 (D.C. Cir. 1996)	24
<i>Bennett v. Plenert</i> , 63 F.3d 915 (9th Cir. 1995) . .	<i>passim</i>
<i>Center for Auto Safety v. National Highway Traffic Safety Admin.</i> , 793 F.2d 1322 (D.C. Cir. 1986) . . .	16
<i>Clarke v. Securities Indus. Ass'n</i> , 479 U.S. 388 (1987)	11, 18, 29
<i>Competitive Enter. Inst. v. National Highway Traffic Safety Admin.</i> , 901 F.2d 107 (D.C. Cir. 1990)	16
<i>Connor v. Burford</i> , 848 F.2d 1441 (9th Cir. 1988), <i>cert. denied</i> , 489 U.S. 1012 (1989)	22
<i>Consumers Union v. FTC</i> , 691 F.2d 575 (D.C. Cir. 1982) (<i>en banc</i>), <i>aff'd</i> , 463 U.S. 1216 (1983)	16
<i>Dan Caputo Co. v. Russian River County Sanitation Dist.</i> , 749 F.2d 571 (9th Cir. 1984)	8
<i>Defenders of Wildlife v. Hodel</i> , 851 F.2d 1035 (8th Cir. 1988), <i>opinion after remand</i> , 911 F.2d 117 (8th Cir. 1990), <i>rev'd on other grounds sub nom. Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992)	5, 15, 18

TABLE OF AUTHORITIES—Continued

<u>CASES</u>	<u>PAGE</u>
<i>Endangered Species Comm. of the Building Indus. Ass'n v. Babbitt</i> , 852 F. Supp. 32 (D.D.C. 1994)	26
<i>Family and Children's Ctr. v. School City</i> , 13 F.3d 1052 (7th Cir.), <i>cert. denied</i> , 115 S.Ct. 420 (1994)	16
<i>FCC v. Sanders Bros. Radio Station</i> , 309 U.S. 470 (1940)	10
<i>Forest Conservation Council v. United States Forest Serv.</i> , 66 F.3d 1489 (9th Cir. 1995)	9
<i>Fouke Co. v. Brown</i> , 463 F. Supp. 1142 (E.D. Cal. 1979)	16
<i>FW/PBS, Inc. v. City of Dallas</i> , 493 U.S. 215 (1990) . .	14
<i>Gladstone, Realtors v. Village of Bellwood</i> , 441 U.S. 91 (1979)	5, 12, 13, 14, 18
<i>Greenpeace Action v. Franklin</i> , 14 F.3d 1324 (9th Cir. 1992)	22
<i>Humane Soc'y v. Hodel</i> , 840 F.2d 45 (D.C. Cir. 1988) .	16
<i>Idaho v. ICC</i> , 35 F.3d 585 (D.C. Cir. 1994)	16
<i>Idaho Conservation League v. Mamma</i> , 956 F.2d 1508 (9th Cir. 1992)	8
<i>Idaho Dep't of Fish and Game v. National Marine Fisheries Serv.</i> , 850 F. Supp. 886 (D. Or. 1994), <i>dismissed as moot</i> , 56 F.3d 1071 (9th Cir. 1995) . .	22
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992) . .	13
<i>Mausolf v. Babbitt</i> , 913 F. Supp. 1334 (D. Minn. 1996)	22, 29

TABLE OF AUTHORITIES—Continued

<u>CASES</u>	<u>PAGE</u>
<i>Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n</i> , 453 U.S. 1 (1981)	15
<i>National Audubon Soc'y v. Hester</i> , 801 F.2d 405 (D.C. Cir. 1986)	16
<i>Pacific Northwest Generating Co-Op. v. Brown</i> , 38 F.3d 1058 (9th Cir. 1994)	8
<i>Pacific Rivers Council v. Thomas</i> , 30 F.3d 1050 (9th Cir. 1994), <i>cert. denied</i> , 115 S. Ct. 1793 (1995)	23
<i>Portland Audubon Soc'y v. Hodel</i> , 866 F.2d 302 (9th Cir.), <i>cert. denied</i> , 492 U.S. 911 (1989)	8
<i>Public Interest Research Group v. Powell Duffryn Terminals, Inc.</i> , 913 F.2d 64 (3d Cir. 1990), <i>cert. denied</i> , 498 U.S. 1109 (1991)	16
<i>Pyramid Lake Paiute Tribe of Indians v. United States Dep't of Navy</i> , 898 F.2d 1410 (9th Cir. 1990)	22
<i>Region 8 Forest Service Timber Purchasers Council v. Alcock</i> , 736 F. Supp. 267 (N.D. Ga. 1990), <i>aff'd due to lack of constitutional standing</i> , 993 F.2d 800 (11th Cir. 1993), <i>cert. denied</i> , 114 S.Ct. 683 (1994)	16
<i>Sierra Club v. EPA</i> , 995 F.2d 1478 (9th Cir. 1995)	8
<i>Sierra Club v. Glickman</i> , 67 F.3d 90 (5th Cir. 1995)	11
<i>Sierra Club v. Marsh</i> , 816 F.2d 1376 (9th Cir. 1987)	21
<i>Sierra Club v. Morton</i> , 405 U.S. 727 (1972)	9, 10
<i>Sierra Club v. Robertson</i> , 28 F.3d 753 (8th Cir. 1994)	8

TABLE OF AUTHORITIES—Continued

<u>CASES</u>	<u>PAGE</u>
<i>Silver v. Babbitt</i> , 68 F.3d 481, 1995 WL 597667 (9th Cir. 1995)	8
<i>Swan View Coalition, Inc. v. Turner</i> , 824 F. Supp. 923 (D. Mont. 1992)	15, 22
<i>Sweet Home Chapter of Communities for a Great Oregon v. Lujan</i> , 806 F. Supp. 279 (D.D.C. 1992), <i>rev'd on rehearing as to legality of "harm" regulation</i> , 17 F.3d 1463 (D.C. Cir. 1994), <i>reh'g denied</i> , 30 F.3d 190 (D.C. Cir. 1994), <i>rev'd sub nom.</i> , <i>Babbitt v. Sweet Home Chapter of Communities for Great Oregon</i> , 115 S. Ct. 2407 (1995)	13, 14
<i>Tennessee Valley Auth. v. Hill</i> , 437 U.S. 153 (1978)	28
<i>Thomas v. Peterson</i> , 753 F.3d 754 (9th Cir. 1995)	9
<i>Trafficante v. Metropolitan Life Ins. Co.</i> , 409 U.S. 205 (1972)	5, 13, 17
<i>Village of False Pass v. Clark</i> , 733 F.2d 605 (9th Cir. 1984)	11
<i>Westlands Water Dist. v. United States Dep't of the Interior</i> , 850 F. Supp. 1388 (E.D. Cal. 1994)	22, 28, 29
 <u>CONSTITUTIONAL AND STATUTORY PROVISIONS</u>	
U. S. Const., art. III	5, 12, 13, 15
Administrative Procedure Act, 5 U.S.C. § 702	10, 11, 12
5 U.S.C. § 704	24
5 U.S.C. § 706	12

TABLE OF AUTHORITIES—Continued

	<u>PAGE</u>
Civil Rights Act of 1968, 82 Stat. 85 (1968)	12
Endangered Species Act of 1973 ("ESA"), as amended, 16 U.S.C. §§ 1531-44	
ESA § 3, 16 U.S.C. § 1532	2, 12
ESA § 4, 16 U.S.C. § 1533	2, 7, 28
ESA § 5, 16 U.S.C. § 1534	14
ESA § 7, 16 U.S.C. § 1536	<i>passim</i>
ESA § 9, 16 U.S.C. § 1538	2, 3, 4, 12, 27
ESA § 10, 16 U.S.C. § 1539	29
ESA § 11, 16 U.S.C. § 1540	<i>passim</i>
Federal Water Pollution Control Act, 33 U.S.C. § 1365	15
Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. § 1415	15
National Environmental Policy Act, 42 U.S.C. § 4332 . . .	8
Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270	17
 <u>ADMINISTRATIVE AND EXECUTIVE MATERIALS</u>	
50 C.F.R. § 17.3	4, 14
50 C.F.R. § 17.11	3, 26, 27
50 C.F.R. § 402.01	3
50 C.F.R. § 402.02	6, 19, 26, 27, 28
50 C.F.R. § 402.14	21, 26
51 Fed. Reg. 19937 (June 3, 1986)	27
51 Fed. Reg. 19956 (June 3, 1986)	21

TABLE OF AUTHORITIES—Continued

	<u>PAGE</u>
 <u>OTHER AUTHORITIES</u>	
H.R. REP. NO. 218, 95th Cong., 1st Sess. (1977), reprinted in 1977 U.S.C.C.A.N. 593	17
H.R. REP. NO. 412, 93d Cong., 1st Sess. (1973)	17
S. REP. NO. 451, 92nd Cong., 2nd Sess. (1972), reprinted in 1973 U.S.C.C.A.N. 4234	17
Craig Arnold, <i>Conserving Habitats and Building Habitats: The Emerging Impact of the Endangered Species Act on Land Use Development</i> , 10 STAN. L. REV. 1 (1991)	4, 19
Michael Bean, <i>THE EVOLUTION OF NATIONAL WILDLIFE LAW</i> (Praeger 1983)	21
Martha Calhoun & Timothy Hammill, <i>Environmental Standing in the Ninth Circuit: Wading Through the Quagmire</i> , 15 PUBLIC LAND L. REV. 249 (1994)	8
Albert Gidari, <i>The Endangered Species Act: Impact Of Section 9 On Private Landowners</i> , 24 ENVTL. L. 419 (1994)	4
James Kilbourne, <i>The Endangered Species Act Under the Microscope: A Closeup Look from A Litigator's Perspective</i> , 21 ENVTL. L. 499 (1991)	26, 27, 28
Steven Quarles, John Macleod, and Thomas Lundquist, <i>Sweet Home and the Narrowing of Wildlife "Take" Under Section 9 of the Endangered Species Act</i> , ENVTL. L. REP. 10003 (Jan. 1996)	4

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

BRAD BENNETT, *et al.*,
Petitioners,

v.

MARVIN PLENERT, *et al.*,
Respondents.

BRIEF AMICUS CURIAE OF THE
AMERICAN FOREST & PAPER ASSOCIATION,
AMERICAN PETROLEUM INSTITUTE,
NORTHWEST FOREST RESOURCE COUNCIL, AND
SOUTHERN TIMBER PURCHASERS COUNCIL
IN SUPPORT OF PETITIONERS¹

STATUTORY AND REGULATORY PROVISIONS

The Endangered Species Act ("ESA") is codified at 16 U.S.C. §§ 1531-44. ESA § 11(g) provides for citizen suits and states in pertinent part:

- (1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf -
(A) to enjoin any person, including the United States and any other governmental instrumentality . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof

¹ Consents to the filing of this brief are on file with the Clerk.

The district courts shall have jurisdiction . . . to enforce any such provision or regulation.

16 U.S.C. § 1540(g). ESA § 11(g) refers to a suit brought by "any person." The ESA defines "person" as "an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality," 16 U.S.C. § 1532(13).

INTEREST OF AMICI CURIAE

Amici represent companies that are regulated, directly and indirectly, under ESA §§ 4, 7 and 9. 16 U.S.C. §§ 1533, 1536 and 1538. ESA § 4 requires a public rulemaking process to list a species as an endangered species or threatened species ("listed species") and to designate critical habitat.

ESA § 7 describes the special obligations of federal agencies toward listed species and critical habitat. These obligations extend to both federal agency actions and private actions requiring some type of federal permit or authorization. ESA § 7 obligations include: (1) the substantive limitations that the federal agency can only approve actions that are "not likely to jeopardize the continued existence of" a listed species or to result in the "adverse modification of [designated critical] habitat" for a listed species; and (2) the procedural duty to assess potential impacts on listed species "in consultation with . . . the Secretary,"² who prepares a biological opinion on

² The ESA delegates most authority to the "Secretary," which refers to the Secretary of the Interior for most listed species and to the Secretary of Commerce for certain marine species. See 16 U.S.C. § 1532(15). The Interior Secretary has delegated his ESA responsibilities to the U.S. Fish and Wildlife Service ("FWS"), while the National Marine Fisheries Service ("NMFS") performs that role for the Commerce

(continued...)

whether the action would jeopardize a listed species' existence or adversely modify critical habitat. 16 U.S.C. § 1536(a)(2) and (b). ESA § 9 prohibits certain acts by "any person," such as the "take" of an endangered species. *Id.* § 1538(a)(1).

Amici represent the forest products and petroleum industries. The American Forest & Paper Association is the national trade association representing the forest products industry. The American Petroleum Institute is the national trade association representing the petroleum industry. These national organizations are joined by two regional trade associations representing the forest products industry: the Northwest Forest Resource Council and the Southern Timber Purchasers Council.

Amici are interested in ensuring that their members have standing to assert that federal agencies are violating ESA limitations by engaging in over-regulation. Such over-regulation can establish inappropriate and unlawful standards and constraints that bar their members -- under pain of potent criminal and civil sanctions and injunctions, see 16 U.S.C. § 1540(a), (b), (e)(6), and (g) -- from pursuit of their economic livelihood. The decision below (63 F.3d 915, Pet. App. 1-18) denies ESA standing to persons who are

²(...continued)

Secretary. 50 C.F.R. §§ 17.11, 402.01(b). This brief will refer to FWS. FWS has ESA authority over the listed fish species of concern in this case and over the majority of listed species. ESA authority is even more broadly shared because, though FWS and NMFS perform an expert's "consultation" role under ESA § 7(a)(2), all federal agencies proposing "agency action[s]" have the ultimate agency responsibility for determining compliance with ESA § 7(a)(2). 16 U.S.C. § 1536(a)(2).

economically injured by alleged violations of the ESA. Accordingly, *Amici* appear here in support of Petitioners.

Regulation of federal and private lands under ESA §§ 4, 7, and 9 has adversely affected the availability of timber and petroleum resources that *Amici*'s members rely on for their economic livelihood. As more species are listed and as federal agencies become more aggressive in their ESA interpretations, the ESA is becoming a pervasive constraint on, and even a bar to, private economic activity. See generally Craig Arnold, *Conserving Habitats and Building Habitats: The Emerging Impact of the Endangered Species Act on Land Use Development*, 10 STAN. L. REV. 1 (1991).

Overly strict and unlawful regulation, in excess of ESA §§ 7 and 9 limitations and requirements, is a continuing problem. Apparent overreaching by FWS and others on what constitutes a wildlife "take" under ESA § 9 and its constituent term "harm," as defined in 50 C.F.R. § 17.3, provided the impetus for the *Sweet Home* suit, which came to the Court last Term.³ There, the Court found that the "harm" regulation is not facially invalid, if "harm" is limited to acts that do actually, proximately, and foreseeably kill or injure members of a listed wildlife species. *Sweet Home*, 115 S.Ct. 2407, 2412 n.9, 2414 and n.9, 2415, 2418 (1995); see *id.* at 2418-21 (concurring opinion of Justice O'Connor).

³ *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S.Ct. 2407 (1995) ("*Sweet Home*"). The broad interpretations of "harm" that prompted the *Sweet Home* suit are discussed in Steven Quarles, John Macleod, and Thomas Lundquist, *Sweet Home and the Narrowing of Wildlife "Take" Under Section 9 of the Endangered Species Act*, ENVTL. L. RPTR. 10003, 10004-05 (Jan. 1996); Albert Gidari, *The Endangered Species Act: Impact Of Section 9 On Private Landowners*, 24 ENVTL. L. 419, 426 (1994).

This beneficial clarification and limitation of "harm" (and "take") would not have occurred had the Ninth Circuit's view of standing been the law of the land. Because the *Sweet Home* plaintiffs' standing was predicated on "economic[]" injury, 115 S.Ct. at 2410, those plaintiffs would have been denied standing under the Ninth Circuit's rule.

SUMMARY OF THE ARGUMENT

ESA § 11(g) eliminates prudential barriers to standing, such as the "zone of interests" test. This is clear from the statutory language. It broadly authorizes citizen suits by "any person" for "any" alleged "violation" of the ESA and provides that the "district courts shall have jurisdiction" over any such suit. 16 U.S.C. § 1540(g)(1). The identical "any person" language in § 810 of the Civil Rights Act of 1968 has been held to "provide[] standing to the fullest extent permitted by Art. III." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 208-12 (1972). The *Sweet Home* decision and lower court decisions such as *Defenders of Wildlife v. Hodel*, 851 F.2d 1035, 1039 (8th Cir. 1988), provide further grounds for concluding that no "zone of interests" test applies to suits under ESA § 11(g). See generally Section I.

Respondents, in their Opposition to the Petition in this case ("Cert. Opp."), suggest they will not seek to defend the "zone of interests" holding of the court below. Rather, they may seek affirmance on alternate grounds which they stylize as a lack of constitutional standing and lack of enforceable ESA § 7 limits on biological opinions. See Cert. Opp. at 9-14. To the extent that such issues are reached by the Court, it is essential to affirm that biological opinions are not immune from judicial review in ESA suits brought by economically-affected parties. See generally Section II.

A considerable body of lower court case law subjects biological opinions to searching judicial review. This is as it must be. ESA § 7(a)(2) and (b) make biological opinions the centerpiece for ESA compliance. FWS's biological opinions are sometimes mistaken. At least when federal agencies conform their actions to FWS's biological opinion (which occurs with relatively rare exceptions) and those actions affect citizens, there is a justiciable controversy that warrants searching review of the biological opinion. *See* Section II.A.

Respondents also argue on the merits that ESA § 7 places no substantive limits on biological opinions, so "a flawed biological opinion would not place FWS or the Secretary 'in violation of' the ESA," as required for a successful ESA citizen suit. Cert. Opp. at 11-12. However, a biological opinion may overreach and violate ESA § 7 in several ways. Examples of viable ESA citizen suits brought by economically-injured persons include claims that a biological opinion: (1) incorrectly concluded that a federally-assisted action would jeopardize a listed species, in violation of ESA § 7(a)(2) and (b); (2) was not based on the "best scientific and commercial data available," in violation of ESA § 7(a)(2); (3) offered a "reasonable and prudent alternatives" to the action that were not "economically feasible," in violation of ESA § 7(b)(3) and 50 C.F.R. § 402.02; and (4) required "reasonable and prudent measures" for an incidental take statement that were not economically reasonable, in violation of ESA § 7(b)(4) and 50 C.F.R. § 402.02. *See* Section II.B.

ARGUMENT

Judge Reinhardt's opinion below reaches the incongruous result that -- although ESA § 11(g) broadly authorizes citizen suits by "any person" for "any" alleged violation of the ESA and provides that the "district courts shall have jurisdiction"

over any such suit -- ESA § 11(g) nonetheless poses a barrier to standing that is not required by Article III of the Constitution. Notwithstanding the breadth of standing afforded by the ESA's text, the court below found that a stringent "zone of interests test applies." Pet. App. 11. The Ninth Circuit's express "holding [is] that only plaintiffs who allege an interest in the preservation of endangered species fall within the zone of interests protected by the ESA" and have standing. *Id.*

Petitioners are irrigation interests whose water withdrawals from federal Bureau of Reclamation ("BOR") reservoirs are constrained as a result of BOR's adherence to the "reasonable and prudent alternatives" that FWS's ESA § 7 biological opinion found were needed to avoid jeopardy to Lost River and shortnose suckers, two listed species of fish inhabiting the reservoirs. The court below found that Petitioners lacked prudential standing to argue violations of ESA §§ 7 and 4. "[S]uits by plaintiffs who are interested only in avoiding the burdens of that preservation effort" purportedly are outside the ESA's zone of protected interests. Pet. App. 14.

The court below has inappropriately closed the courthouse door to economically-injured plaintiffs who wish to argue that federal agencies have violated ESA §§ 7 and 4. Notably, the Cert. Opp. did not defend the "zone of interests" test employed by the court below. Instead, the Cert. Opp. (at 9-14) suggested that Respondents would seek affirmance largely on other grounds. Whatever positions on other issues Respondents may take in their merits brief, this Court should reverse the holding of the court below that a prudential "zone of interests" barrier to standing applies to ESA § 11(g) citizen suits.

I. THE ESA'S CITIZEN SUIT PROVISION ELIMINATES PRUDENTIAL STANDING BARRIERS

The *Bennett v. Plenert* decision is part of a disturbing trend in Ninth Circuit jurisprudence. That court tends to grant broad rights of standing and intervention to environmental interests, but to deny equal rights to economic interests.⁴ By

⁴ For example, the Ninth Circuit has found that environmental groups have standing to bring facial challenges to forest plans in situations in which other courts have found that a justiciable controversy is absent. Compare *Idaho Conservation League v. Mumma*, 956 F.2d 1508 (9th Cir. 1992), with *Sierra Club v. Robertson*, 28 F.3d 753 (8th Cir. 1994). In the decision below – and in cases like *Pacific Northwest Generating Co-Op. v. Brown*, 38 F.3d 1058 (9th Cir. 1994), and *Dan Caputo Co. v. Russian River County Sanitation Dist.*, 749 F.2d 571 (9th Cir. 1984) – the Ninth Circuit found that environmental interests have citizen suit standing under the ESA and Clean Water Act, while economically-affected entities do not. See generally Martha Calhoun and Timothy Hammill, *Environmental Standing In the Ninth Circuit: Wading Through The Quagmire*, 15 PUBLIC LAND L. REV. 249 (1994).

With respect to intervention, the Ninth Circuit initially imposed what amounts to a "zone of interests" test that precluded economically-affected entities from intervening to protect their Rule 24 "interests" in suits brought under environmental statutes. *Portland Audubon Soc'y v. Hodel*, 866 F.2d 302, 309 (9th Cir.), *cert. denied*, 492 U.S. 911 (1989) (denying intervention to timber interests). That court later supposedly eliminated the "zone of interests" barrier to intervention in suits other than those under the National Environmental Policy Act ("NEPA"). *Sierra Club v. EPA*, 995 F.2d 1478, 1483-85 (9th Cir. 1993). However, the Ninth Circuit has still denied intervention to entities whose contract rights were impaired by an injunction on the unpersuasive ground that the impairment would be short-lived under the injunction. E.g., *Silver v. Babbitt*, 68 F.3d 481, 1995 WL 597667 (9th Cir. 1995). Through an unwarranted parsing of a single civil action into a merits phase and relief phase, the Ninth Circuit has prevented an economically-affected entity from intervening in the merits phase of a NEPA case, and has restricted intervention to briefing the propriety of injunctive relief (which is

(continued...)

denying economic interests the right to be heard, the decision below fails an elemental test for fairness: a level playing field.

The inevitable result of such a one-sided standing doctrine is that the law will move in the direction of the (here, environmental) plaintiffs granted standing. The nature of the judicial process is such that, when only one side of a continuing public controversy may seek recourse in the courts, the law moves incrementally towards institutionalizing and legitimizing the position of the interest group that has the ability to invoke the courts' jurisdiction. The position of the party barred from the courts is never heard, is never embraced by the courts, and achieves no legitimacy. The skewed law of standing also results in substantive changes in agency behavior, as an agency evaluates its obligations against the backdrop of judicial decisions construing those obligations and with an eye towards those who can sue the agency. The Court should be reluctant to believe that Congress intended to so skew the development of standing law and substantive law when Congress passed the ESA and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-06.

There has been a trend "toward recognizing that injuries other than economic harm are sufficient" for standing. *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972). This does not mean, however, that now only environmental interests have

⁴(...continued)

virtually a foregone conclusion in the Ninth Circuit once a violation of an environmental statute is found). *Forest Conservation Council v. United States Forest Serv.*, 66 F.3d 1489, 1499 and n.11 (9th Cir. 1995); see *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985) ("absent 'unusual circumstances,' an injunction is the appropriate remedy for a NEPA violation).

standing, while economic interests do not. The law of standing has not turned that topsy-turvy.

This *expansion* of standing beyond its historical core of economic injury nonetheless retains that core. The "fact of economic injury is what gives a person standing." *Id.* at 737. "Certainly he who is 'likely to be financially' injured, *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 477, may be a reliable private attorney general to litigate the issues of the public interest." *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970). Accordingly, the economically-injured Petitioners should be able to argue the public interest inherent in ensuring compliance with the ESA.

No "zone of interests" test or other prudential barrier to standing should apply to ESA § 11(g) citizen suits for the following reasons:

1. "[P]alpable economic injuries have long been recognized as sufficient to lay the basis for standing, with or without a specific statutory provision for judicial review" like ESA § 11(g). *Sierra Club v. Morton*, 405 U.S. at 733-34. Thus, the Court should presume that ESA § 11(g) provides access to the courts for those alleging economic injury.

The Court should also presume that the ESA citizen suit provision broadens standing beyond the "zone of interests" test that applies to suits brought under the APA.⁵ Otherwise, ESA

⁵ For suits brought under the APA, the plaintiff must be "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. From this language, the Court derived a prudential standing test for APA suits. This is the "zone of interests" test of "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or (continued...)"

§ 11(g)'s references to suits against federal agencies are surplusage, as they add nothing to the right of review already provided by the APA. *See Sweet Home*, 115 S.Ct. at 2413 (there is a "reluctance to treat statutory terms as surplusage").

2. The expansive language of ESA § 11(g) precludes the creation of any prudential barriers to standing in ESA citizen suits. This Court derived the prudential "zone of interests" test from the APA requirement that the plaintiff be "aggrieved by agency action within the meaning of a relevant statute." *Data Processing Serv.*, 397 U.S. at 153 (quoting 5 U.S.C. § 702). Subsequently, in *Clarke v. Securities Indust. Ass'n*, 479 U.S. 388, 395, 400 n.16 (1987) ("*Clarke*"), the Court emphasized that the "zone of interest" test "is most usefully understood as a gloss on the meaning of § 702."⁶

⁵(...continued)
regulated by the statute or constitutional guarantee in question." *Data Processing Serv.*, 397 U.S. at 153.

⁶ The court below read *Clarke* differently. It interpreted *Clarke* as providing for the use of the "traditional zone of interests test" in actions "not brought under the Administrative Procedure Act." Pet. App. 6. *Clarke* made precisely the opposite point. The *Clarke* Court stated that the APA "zone of interests" test "is not a test of universal application," though statutory review provisions other than the APA "may" create their own "prudential standing" tests. *Clarke*, 479 U.S. at 400-01 n.16. As developed in the text, the plain meaning and established judicial meaning of the broad "any person" language of ESA § 11(g) leave no room for courts to apply a "zone of interests" analysis. This remains true even if the APA does apply to ESA citizen suits to the extent of specifying the standard of judicial review, as several lower courts have held. *E.g., Sierra Club v. Glickman*, 67 F.3d 90, 96 (5th Cir. 1995); *Village of False Pass v. Clark*, 733 F.2d 605, 609-10 (9th Cir. 1984). The logic of these decisions is that the APA acts as a gap-filler: that because ESA § 11(g) does not provide any standard for (continued...)

Congress may freely eliminate the "zone of interests" test. "Congress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one 'who otherwise would be barred by prudential standing rules.'" *Gladstone*, 441 U.S. at 100. ESA § 11(g) lacks APA-like language suggesting that the plaintiff must be aggrieved within the meaning or purposes of the ESA. Instead, ESA § 11(g) broadly authorizes citizen suits by "any person" for "any" alleged violation of the ESA. 16 U.S.C. § 1540(g)(1). This broad language clearly encompasses a suit brought by Petitioners or any other economically-injured "person" who is alleging that ESA limitations have been violated.

This is confirmed by the definition of "person" and its use in other ESA sections. Since ESA § 3(13) defines "person" to include a "corporation" and other economically-motivated entities, 16 U.S.C. § 1532(13), ESA § 11(g) should be read as including economically-motivated suits. ESA § 9 makes it unlawful for "any person," including an economically-motivated entity, to "take" an endangered species. 16 U.S.C. § 1538(a)(1). Accordingly, the same "any person" language in ESA § 11(g) should also include economic entities.

The ESA further provides that the "district courts shall have jurisdiction" over a suit brought by "any person." 16

⁶(...continued)

judicial review when suing a federal agency, the APA (in 5 U.S.C. § 706(2)(A)) provides the relevant review standard. However, because ESA § 11(g) itself provides a right of review and its "any person" language signifies that Congress removed prudential barriers to standing, there is no persuasive reason to engraft onto the ESA the APA right of review provision (5 U.S.C. § 702) and its "zone of interests" test.

U.S.C. § 1540(g)(1). This signifies that Congress eliminated prudential barriers to jurisdiction.

3. This Court's precedents confirm that ESA § 11(g) permits suits by economically-injured plaintiffs and eliminates prudential barriers to standing.

a. The language in § 810 of the Civil Rights Act of 1968, allowing a suit by "any person," has been found to provide "standing to the fullest extent permitted by Art. III." *Gladstone*, 441 U.S. at 100; *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 208-12 (1972). The identical "any person" language in the ESA (and in the citizen suit provisions in many other environmental laws) should be construed to provide standing to the fullest extent permitted by Article III. Moreover, the Court has implicitly so construed ESA § 11(g) in two decisions discussed below.

b. The six Justices who commented on ESA § 11(g) in the 1992 constitutional standing decision in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), apparently assumed that it expanded standing to its Article III limits. Those Justices opinions focused on why Congress could not go *beyond* Article III limits and create standing where there was no imminent injury-in-fact. *Id.* at 555, 571-74, 578, 580.

c. This 1992 understanding of ESA § 11(g) may explain why the ESA standing of economically-injured plaintiffs was not questioned by the government or any of the three reviewing courts in *Sweet Home*.⁷ *Sweet Home* was an

⁷ *Sweet Home Chapter of Communities for a Great Oregon v. Lujan*, 806 F. Supp. 279 (D.D.C. 1992), *aff'd*, 1 F.3d 1 (D.C. Cir. 1993), *rev'd on rehearing as to legality of "harm" regulation*, 17 F.3d 1463 (D.C. Cir. 1994), *reh'g denied*, 30 F.3d 190 (D.C. Cir. 1994).

(continued...)

ESA citizen suit in which plaintiffs contended that FWS had engaged in over-regulation -- specifically that the "harm" regulation at 50 C.F.R. § 17.3 violated limitations found in ESA §§ 5, 7, and 9. See page 4, above.

The *Sweet Home* plaintiffs' standing was clearly premised on economic injury. "Their complaint alleged that application of the 'harm' regulation . . . had injured them economically." *Sweet Home*, 115 S.Ct. at 2410. "Plaintiffs claim that those restrictions [on timber harvesting] have forced them to lay off employees, . . . and placed some of the plaintiffs in the position of being unable to support their families." *Sweet Home*, 806 F. Supp. at 282.

Although the Court was "under an independent obligation" to question standing if there was a legitimate standing issue (*FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-31 (1990)), no such standing issue was raised in *Sweet Home*. (Nor did the government raise a standing issue or "zone of interests" before any of the three courts in *Sweet Home*.) After noting that plaintiffs had been "injured . . . economically" by an ESA regulation, this Court proceeded directly to the merits. *Sweet Home*, 115 S.Ct. at 2410.

Thus, this Court's merits disposition in *Sweet Home* signifies that the court below erred in holding that "economic interests" or other persons desiring to reduce ESA "burdens" are disqualified from ESA standing, and erred in holding that

⁷(...continued)

rev'd finding the "harm" regulation facially valid sub nom. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S.Ct. 2407 (1995). *Amici* include one of the plaintiffs in that case (the Southern Timber Purchasers Council). Counsel for *Amici* served as counsel for plaintiffs in *Sweet Home*.

"only plaintiffs who allege an interest in the preservation of endangered species fall within the zone of interests" that can bring ESA § 11(g) citizen suits. Pet. App. at 11-12, 14.

d. The Court has construed the citizen suit language in the Federal Water Pollution Control Act (33 U.S.C. § 1365) -- and seemingly the citizen suit language of the Marine Act, 33 U.S.C. § 1415, that was the model for ESA § 11(g) (see page 16 n.10, below) -- as allowing suits by all citizens suffering constitutional injury-in-fact. It allowed a suit by "respondents who assert that they have suffered tangible economic injuries because of statutory violations." *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 16-17 (1981). Accordingly, the economic injuries suffered by Petitioners here should not preclude their standing under another environmentally-oriented statute.

4. The better-reasoned lower court opinions have concluded, consistent with this Court's opinion in *Gladstone*, that the "any person" language provides standing to the fullest extent permitted by Article III. The Eighth Circuit and at least three other lower courts have concluded that ESA § 11(g) eliminates the prudential "zone of interests" test:

Unlike the constitutional requirements, Congress may eliminate the prudential limitations [on standing] by legislation. . . . In this case, the ESA provides that "any person" may commence a suit to enjoin any person who is alleged to be in violation of the ESA. . . . Defenders therefore need meet only the constitutional requirements for standing for their claims under the ESA.⁸

⁸ *Defenders of Wildlife v. Hodel*, 851 F.2d 1035, 1039 (8th Cir. 1988), *opinion after remand*, 911 F.2d 117 (8th Cir. 1990), *rev'd on* (continued...)

Other appellate decisions have correctly read indistinguishable citizen suit provisions as removing prudential barriers to standing.⁹

⁸(...continued)

other grounds, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); see *Swan View Coalition, Inc. v. Turner*, 824 F. Supp. 923, 929 (D. Mont. 1992) (plaintiffs suing under the ESA "need only meet the constitutional requirements for standing"); *Region 8 Forest Service Timber Purchasers Council v. Alcock*, 736 F. Supp. 267, 273 (N.D. Ga. 1990) ("the citizen suit proviso of the Species Act 'clearly removes the judicial authority to create prudential barriers'" to standing), *aff'd due to lack of constitutional standing*, 993 F.2d 800 (11th Cir. 1993), *cert. denied*, 114 S.Ct. 683 (1994); *Fouke Co. v. Brown*, 463 F. Supp. 1142, 1144 (E.D. Cal. 1979).

⁹ *E.g.*, *Family and Children's Ctr. v. School City*, 13 F.3d 1052, 1061 (7th Cir.), *cert. denied*, 115 S.Ct. 420 (1994); *Public Interest Research Group v. Powell Duffryn Terminals Inc.*, 913 F.3d 64, 70 n.3 (3d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991); *Competitive Ent. Inst. v. National Highway Traffic Safety Admin.*, 901 F.2d 107, 118-19 (D.C. Cir. 1990); *Center for Auto Safety v. National Highway Traffic Safety Admin.*, 793 F.2d 1322, 1336-37 (D.C. Cir. 1986); *Alvarez v. Longboy*, 697 F.2d 1333, 1336 (9th Cir. 1983); *Consumers Union v. FTC*, 691 F.2d 575, 576 (D.C. Cir. 1982) (*en banc*), *aff'd*, 463 U.S. 1216 (1983). Given this long line of D.C. Circuit authority, it is surprising the D.C. Circuit assumed that a prudential "zone of interests" test applied under the ESA in three cases cited by the court below. *Pet. App.* 8 n.3, *citing Idaho v. ICC*, 35 F.3d 585, 592 (D.C. Cir. 1994); *Humane Soc'y v. Hodel*, 840 F.2d 45, 60-61 (D.C. Cir. 1988); *National Audubon Soc'y v. Hester*, 801 F.2d 405, 407 n.2 (D.C. Cir. 1986). Because the applicability of a "zone of interests" test apparently was not opposed by the plaintiffs in those cases and standing was found, those cases' statements about the "zone of interests" test were not necessary to the decisions. Additionally, the most recent opinion cites the ESA § 11(g) "any person" language as meaning that the "ESA specifically authorizes a State to bring an action to enforce its provisions." *Idaho*, 35 F.3d at 592. Thus, the *Idaho* opinion can be read as endorsing broad ESA standing, and D.C. Circuit decisions provide little support for the Ninth Circuit opinion under review.

5. The direct legislative history of ESA § 11(g) does nothing to contradict the broad statutory language. It does *not* suggest an intent to restrict access to the courts.¹⁰

Moreover, Congress has stated that citizen suit provisions with similar language push standing to its constitutional limits. The Surface Mining Control and Reclamation Act of 1977 contains a provision allowing "any person having an interest which is or may be adversely affected" to commence a citizen suit, and provides that the "district courts shall have jurisdiction." 30 U.S.C. § 1270(a). The House Report stated that this language "shall be construed to be coterminous with the broadest standing requirements enunciated by the U.S. Supreme Court." H.R. REP. NO. 218, 95th Cong., 1st Sess., *reprinted in* 1977 U.S.C.C.A.N. 593, 626. The identical language in ESA § 11(g) should be similarly construed to eliminate prudential barriers to standing.

¹⁰ The House Report repeats the "any person" language employed in the ESA text and identifies the model for the ESA language:

It allows any person, including a Federal official, to seek remedies involving injunctive relief for violations or potential violations of the Act. The language is parallel to that contained in the recent Marine Protection, Research and Sanctuaries Act of 1972, and is to be interpreted in the same fashion.

H.R. REP. NO. 412, 93d Cong., 1st Sess. 19 (1973). The model is the citizen suit subsection of the ocean dumping section of the Marine Act, 33 U.S.C. § 1415(g). The legislative history of the referenced Marine Act also states that this "subsection provides for a civil suit by *any person* on his own behalf to enjoin violations of the Act or violations of regulations." S. REP. NO. 451, 92d Cong., 2d Sess., *reprinted in* 1972 U.S.C.C.A.N. 4234, 4249 (emphasis added). Thus, the legislative history of ESA § 11(g) provides no basis for questioning the obvious breadth of the statutory language.

6. In sum, the Court should hold that no "zone of interests" test or other prudential barrier to standing applies to ESA § 11(g) suits. The contrary holding of the court below should be reversed.¹¹

II. RESPONDENTS' ALTERNATIVE ESA ARGUMENTS LACK MERIT

In opposing this Court's grant of *certiorari*, the government did not directly defend the "zone of interests" holding of the court below. Instead, the government sought to invoke a theory of constitutional standing to sustain the judgment (Cert. Opp. at 9-11), and argued on the merits that even a "flawed biological opinion would not place FWS or the Secretary 'in violation of' the ESA." Cert. Opp. at 11-12.

In part because it is unclear what the government will argue now that the Court has granted review, *Amici* will not attempt to address in this brief the intricacies of whether the case as now constituted presents a justiciable controversy over the biological opinion in question. The issues of constitutional

¹¹ It can be asked: How did the court below reach such an obviously mistaken result? One answer is that the court below seemed more interested in extending the one-sided theory of standing expressed in other questionable Ninth Circuit decisions than in confronting the ESA statutory language and cases broadly construing the "any person" language. For example, the court below blithely brushed aside the ESA § 11(g) language by stating "our court, and others, have regularly employed the zone of interests test in determining standing despite Congress' enactment of expansive citizen suit provisions." Pet. App. at 8-9. But the legislative judgment *is* controlling as to whether prudential barriers to standing should be applied. *Clarke*, 479 U.S. at 394 n.7; *Gladstone*, 441 U.S. at 100. This Court's precedents in *Gladstone* and *Trafficante* were not even mentioned in the opinion below; *Clarke* was misinterpreted; and contrary circuit court precedents like *Defenders of Wildlife* were relegated to a footnote. See Pet. App. at 8 n.3.

standing, final agency action, and proper governmental defendants, to which the government has alluded are beyond the scope of this brief.

Amici are very concerned, however, that the government's effort to demonstrate the nonjusticiability of the instant case is based on arguments that would undermine the ability of parties economically injured by biological opinions to mount effective challenges to erroneous opinions in any suit. Specifically, in Section II.A, *Amici* will show that biological opinions have been, and properly are, subject to judicial review in a wide range of circumstances. In Section II.B, *Amici* will show that ESA § 7 does place constraints on a biological opinion, so a "flawed biological opinion" *can* violate the ESA.

These issues are significant because of the broad range of economic activity that is adversely affected by ESA § 7. 16 U.S.C. § 1536. While ESA § 7 concerns the responsibilities of federal agencies, it also imposes restrictions on private activities that require any form of federal authorization.¹² Under ESA § 7(a)(2), the private activity cannot be conducted: (1) until the federal agency whose authorization is needed ("action agency") completes an ESA consultation process with

¹² The regulations implementing ESA § 7 broadly define a covered "Action" as "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies." These include: (1) the "granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid" to the private sector; and (2) allowing private economic uses of federal lands that "directly or indirectly caus[e] modifications to the land, water, or air." 50 C.F.R. § 402.02; see *id.* at definition of "effects of the action." Due to the "wide range of projects involving federal permits, approvals, funding, or participation, the potential impact of section 7 [on "private" activities] is quite extensive." Arnold, 10 STAN. ENVTL. L. J. at 1-2; see Brief Amicus Curiae of the National Association of Homebuilders in Support of *Certiorari* at 4-6.

FWS or NMFS, the government's expert agencies on ESA matters; and (2) if the action agency concludes that the action is likely to jeopardize the continued existence of any listed species or adversely modify any designated critical habitat:

Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical

16 U.S.C. § 1536(a)(2). FWS carries out its formal "consultation" role by preparing a biological opinion on the effects of the proposed agency action pursuant to ESA § 7(b), 16 U.S.C. § 1536(b). In Section II.B, we will explain some of the ESA § 7(b) constraints on biological opinions.

A. Biological Opinions Are Subject To Judicial Review

1. Because the expert agency's biological opinion was intended by Congress to, and does in practice, normally control the action agency's final action, the highly significant and determinative biological opinion should be subject to judicial review. The ESA's structure suggests Congress did not expect that biological opinions would escape review.¹³

¹³ In other words, one can agree with the Solicitor General's premise that FWS's biological opinion is advisory and leaves the action agency (at least theoretically, if not in practice) with the ultimate agency authority to determine compliance with ESA § 7(a)(2). See Cert. Opp. at 10-11. However, this premise does *not* warrant the conclusion that biological opinions forever escape judicial review.

ESA § 7(a)(2) and (b) establish an extensive process for consulting with the ESA-expert agency (FWS or NMFS). The process includes obtaining expert agency's biological opinion on whether the agency action would jeopardize a listed species, obtaining in the opinion the expert's "reasonable and prudent alternatives" if jeopardy is found, and obtaining in the opinion the expert's judgment on the "reasonable and prudent measures" needed to obtain an incidental take statement. 16 U.S.C. § 1536(a)(2), (b); 50 C.F.R. § 402.14(g)-(j). Congress made the biological opinion the *centerpiece* of this extensive process because it expected that action agencies would adhere to the expert's biological opinion.

Respondents have suggested, however, that the action agency's ultimate decision on ESA compliance for a federally-assisted action is not sufficiently influenced by (or, in "standing" parlance, is "not fairly traceable to") the content of a biological opinion. Cert. Opp. at 10-11. That argument renders meaningless ESA § 7(b), and does not accord with legal and practical realities. Courts have found that an action agency that acts contrary to a biological opinion does so at its considerable peril.¹⁴ Thus, as a practical matter, action agencies *must and do* comply with FWS's biological opinions.

¹⁴ E.g., *Sierra Club v. Marsh*, 816 F.2d 1376, 1388 (9th Cir. 1987) (FWS "is primarily responsible for protecting endangered species . . . we defer to the agency [FWS] with the more appropriate expertise"); Michael Bean, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 362, 368 (Praeger 1983) (courts have "erect[ed] a major hurdle for an agency that chooses to [proceed with a project] . . . in the face of an adverse biological opinion"); 51 Fed. Reg. 19956 (June 3, 1986) (preamble to final ESA § 7 regulations stating "courts have accorded Service biological opinions great deference").

In fact, BOR complied with FWS's biological opinion here. BOR agreed to follow the "reasonable and prudent alternatives" that FWS's biological opinion said were necessary to avoid jeopardy to the listed fish species (minimum reservoir levels). See Pet. App. 3-4, 24-25, 32, 39-40.

In sum, a biological opinion was intended to and does normally dictate the action agency's decision. Accordingly, economic injuries can be fairly traced to the biological opinion, at least when (as here) the action agency follows that opinion.

2. Any argument that a biological opinion might be shielded from a searching judicial review flies in the face of numerous lower court decisions that have reviewed the adequacy of biological opinions. *E.g.*, *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1336-37 (9th Cir. 1992); *Connor v. Burford*, 848 F.2d 1441, 1451-58 (9th Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989); *Mausolf v. Babbitt*, 913 F. Supp. 1334 (D. Minn. 1996); *Westlands Water Dist. v. United States Dep't of the Interior*, 850 F. Supp. 1388, 1425-26 (E.D. Cal. 1994); *Idaho Dep't of Fish and Game v. National Marine Fisheries Serv.*, 850 F. Supp. 886 (D. Or. 1994), *dismissed as moot*, 56 F.3d 1071 (9th Cir. 1995); *Swan View Coalition, Inc. v. Turner*, 824 F. Supp. 923, 932-36 (D. Mont. 1992). Biological opinions have been reviewed in suits brought by persons trying to reduce ESA burdens, such as the plaintiffs in *Mausolf* and *Westlands*. In two prior suits, constitutional standing to challenge a biological opinion was contested on grounds like those the government may present here, and standing was found to exist. *Mausolf*, 913 F. Supp. at 1341-43; *Swan View Coalition*, 824 F. Supp. at 929-32.

Pyramid Lake Paiute Tribe of Indians v. United States Dep't of Navy, 898 F.2d 1410 (9th Cir. 1990), cited by the government (Cert. Opp. at 10), is not to the contrary.

Because that plaintiff failed to name FWS as "a party to this action" (898 F.2d at 1415), the court found the plaintiff could not directly question FWS's biological opinion. Here, since Petitioners named FWS as a defendant and challenged its biological opinion, the *Pyramid Lake* logic does not apply.

3. Thus, the legally-significant and normally-determinative biological opinion is and should be subject to a searching judicial review at some stage — it cannot evade judicial review forever. We take no position on whether the biological opinion at issue here, viewed in isolation at the time of its issuance, is subject to judicial review or whether the Complaint should be characterized as bringing that type of challenge. In at least some factual situations, the existence of an adverse biological opinion does seem to cause a sufficient injury to create a justiciable controversy.¹⁵

¹⁵ Just as ESA § 11(g) provides standing to its constitutional limits, see Section I, ESA § 11(g) seems to extend the jurisdictional concepts of ripeness and reviewable agency action to their constitutional limits. ESA § 11(g) purports to provide district court "jurisdiction" over "any" claim that any "agency" action, including FWS's issuance of a biological opinion, is "in violation of" the ESA. 16 U.S.C. § 1540(g)(1).

When, for example, the issuance of an adverse biological opinion lowers property values or causes a bank to refuse to lend money for a federally-assisted project, this economic injury may require judicial review of the opinion even in the absence of a decision by the action agency. Another compelling example concerns the Ninth Circuit's logic that, after a new species is listed under the ESA, ongoing timber harvesting and activities in a national forest containing that species must be enjoined until ESA consultation is completed on the forest plan for that national forest. *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 1793 (1995). If FWS issues an allegedly-mistaken biological opinion, there appears to be a sufficient economic injury (due to the continuing injunction) for present judicial review of the opinion, rather than letting injuries continue until an action is taken based on the allegedly-mistaken opinion.

Although a challenge to a biological opinion at the time of its issuance should be considered ripe to address any injury the opinion inflicts, once the action agency has relied on a biological opinion and has taken a final action that threatens immediate injury to a plaintiff, there certainly is a concrete controversy for review. The constitutional minima for standing also clearly would be satisfied. Plaintiff's alleged injury would be fairly traceable to the biological opinion when the action agency simply structured its action to conform with the opinion. The plaintiff's economic injury would likely be redressed if a court required correction of the biological opinion, because the action agency likely would follow FWS's less-onerous opinion.

Additionally, once a plaintiff is in court, and affected by the biological opinion through final agency action, judicial review necessarily extends to the biological opinion that formed the basis for the agency's ultimate action. *Accord Bangor Hydro Electric Co. v. FERC*, 78 F.3d 659 (D.C. Cir. 1996) (searching review of FWS's fisheries prescriptions on review of FERC order adopting those prescriptions). This proposition reflects ordinary rules of administrative law. The APA provides for full review of a "preliminary, procedural, or intermediate agency action or ruling" during the review of the "final agency action." 5 U.S.C. § 704. Thus, to the extent a biological opinion is viewed as only an "intermediate" ruling, the opinion is subject to full judicial review during review of an action agency's final action.

B. There Are Viable Claims That ESA § 7 Has Been Violated By Over-Regulation

Thus, there is no jurisdictional bar to subjecting a biological opinion to searching judicial review. This leaves Respondents' *merits* argument that "a flawed biological opinion

would not place FWS or the Secretary 'in violation of' the ESA" because ESA § 7 lacks substantive limits enforceable by an economically-injured plaintiff. Cert. Opp. at 11-12.

As shown below, ESA § 7 and the implementing regulations at 50 C.F.R. Part 402 *do* establish legal constraints on biological opinions. If an opinion exceeds such constraints, there has been a "violation of a[] provision of this [ESA] chapter or regulation" that can be enjoined. 16 U.S.C. § 1540(g)(1)(A). Thus, as the examples below demonstrate, ESA § 7 provides numerous grounds for economically-injured persons to bring successful ESA § 11(g) citizen suits.

1. The ESA and regulations establish a maximum time period for ESA consultation and issuance of a biological opinion on any federally-assisted action involving a private "applicant," unless the applicant agrees to a time extension. *See* 16 U.S.C. § 1536(b)(1)(B); 50 C.F.R. § 402.14(e). Thus, there is a viable suit that FWS has violated ESA § 7 when it has taken longer than the maximum period to provide its biological opinion, and thereby unlawfully delayed a needed federal authorization.

2. Closer to the claims in this case, FWS violates its ESA § 7 duty to issue an accurate biological opinion when it concludes that a federally-assisted action would jeopardize the continued existence of a listed species, if the plaintiff can show that the jeopardy conclusion is factually inaccurate or is based on an incorrect legal standard. Petitioners bring a claim that FWS has "improperly conclud[ed]" that continued operation of the reservoirs "is likely to jeopardize" listed species of fish. Pet. App. 40-41. There are several ways that a plaintiff can demonstrate that a jeopardy opinion is mistaken.

a. A biological opinion must be based on the "best scientific and commercial data available." 16 U.S.C. § 1536(a)(2). Thus, a jeopardy conclusion based on outdated or inaccurate data violates ESA § 7(a)(2). *Accord Endangered Species Comm. of the Building Indus. Ass'n v. Babbitt*, 852 F. Supp. 32 (D.D.C. 1992) (example where FWS failed to disclose the questionable data for an ESA § 4 listing decision).

b. A biological opinion should be restricted to "how the agency action affects the species or its critical habitat" and whether the incremental effects of the "agency action" cause jeopardy or adversely modify critical habitat. 16 U.S.C. § 1536(b)(3). FWS, instead of restricting its opinion to the effects of the "agency action" (defined in § 1536(a)(2) as the specific portion of a private action that requires federal authorization), sometimes finds jeopardy based on the current status of the species under the "environmental baseline," on the indirect effects of interrelated private actions that do not require a federal approval, or on the "cumulative effects" of unrelated actions. See 50 C.F.R. §§ 402.02 (definitions of "cumulative effects" and "effects of the action"), 402.14(g)(3) and (4); James Kilbourne, *The Endangered Species Act Under the Microscope: A Closeup Look from A Litigator's Perspective*, 21 ENVTL. L. 499, 531-34 (1991). When the "agency action" itself would not cause jeopardy itself, there is a credible argument that a jeopardy opinion violates the above-quoted portions of ESA § 7(a)(2) and (b)(3).

c. As another example of legally-mistaken jeopardy opinions, a threatened species usually has a sizable number of members over the listed area (e.g., the grizzly bear, which 50 C.F.R. § 17.11(h) lists as threatened in the conterminous 48 United States). However, FWS sometimes determines jeopardy, not with respect to the entire "threatened species,"

but with respect to a smaller "population" (e.g., grizzly bears in the Selkirk Mountains). This approach finds jeopardy more frequently, since it is easier to jeopardize a small population than an entire species.

There is a convincing argument that such a biological opinion violates ESA § 7(a)(2). FWS will not have determined jeopardy with respect to the "endangered species or threatened species" unit which is listed in 50 C.F.R. § 17.11(h), as 16 U.S.C. § 1536(a)(2) explicitly requires.

3. Two provisions in ESA § 7(b) require that a biological opinion offer economically reasonable solutions to ESA compliance problems. When FWS does not do so, there are viable claims that the opinion violates ESA § 7(b)(3) or (b)(4).

a. If the biological opinion concludes that the proposed action would jeopardize a listed species, the opinion "shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) of this section and can be taken by the Federal agency or applicant in implementing the agency action." 16 U.S.C. § 1536(b)(3)(A). As the statutory language suggests and implementing regulations confirm, the "reasonable and prudent alternatives" must be economically "reasonable" and still allow the private applicant to implement an alternative form of its desired action. FWS's biological opinion must identify alternatives that are "economically and technologically feasible" and that "can be implemented in a manner consistent with the intended purpose of the action." 50 C.F.R. § 402.02 (definition of "reasonable and prudent alternatives"); see 51 Fed. Reg. 19937 (June 3, 1986) (explanation in preamble to final rules); Kilbourne, 21 ENVTL. L. at 543.

Thus, there is a viable claim that FWS has violated ESA § 7(b)(3) and the regulations if its biological opinion suggests "reasonable and prudent alternatives" that are not economically reasonable. See *Westlands Water Dist.*, 850 F. Supp. at 1425-26 (example of such a claim by irrigation interests).

b. A biological opinion may also violate an economic limitation in 16 U.S.C. § 1536(b)(4). ESA § 7(b)(4) provides for the issuance of an incidental take statement which excuses the federally-assisted action from any incidental "take" (see ESA § 7(o)) otherwise barred by ESA § 9, if the action meets ESA § 7(a)(2)'s minimum standard of avoiding jeopardy to the listed species as a whole. A person who desires the benefit of an incidental take statement must agree to go beyond the minimum required to avoid jeopardy at the species level and adopt "those reasonable and prudent measures that the Secretary" specifies in the biological opinion to minimize "takes" of individuals. 16 U.S.C. § 1536(b)(4)(B)(ii).

"Reasonable and prudent measures" also must be economically reasonable. "[T]hey should be minor changes that do not alter the basic design, location, duration, or timing of the action." 51 Fed. Reg. 19937 (June 3, 1986) (preamble explaining the 50 C.F.R. § 402.02 definition of "reasonable and prudent measures"). See *Kilbourne*, 21 ENVTL. L. at 554-56. Accordingly, there is a viable claim that a biological opinion violates ESA § 7(b)(4) if it adopts "reasonable and prudent measures" that are not economically prudent.¹⁶

¹⁶ The ESA, as originally enacted in 1973, may have reflected a goal of reversing the "trend towards species extinction, whatever the cost." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978). But the ESA amendments Congress adopted in 1978, 1979, and 1982 in reaction to the *TVA* decision -- such as 16 U.S.C. §§ 1533(b)(2),
(continued...)

Additionally, a biological opinion can violate ESA §§ 7(b)(4) and 9 when it identifies as "incidental take" (and imposes "reasonable and prudent measures" to minimize such incidental take) an activity that is not "take" under this Court's decision in *Sweet Home*. See *Mausolf v. Babbitt*, 913 F. Supp. at 1344 (example of such a successful claim).

c. Petitioners assert violations of ESA § 7(b)(3) and (4). FWS's biological opinion found that continuation of past operating regime for the BOR reservoirs is likely to jeopardize listed fish species, even though the fish species obviously survived during the past operating regime. FWS specified minimum lake or reservoir levels as ESA § 7(b)(3) reasonable and prudent alternatives to avoid jeopardy -- and, apparently, as ESA § 7(b)(4) reasonable and prudent measures to minimize "take" -- and BOR agreed to adopt these alternatives and

¹⁶(...continued)

1536(a)(2), (b)(3), (b)(4), (e)-(h), 1539(a) -- signify that economics do count and some costs are too great to bear.

Moreover, in the unlikely event that a "zone of interests" test applies to ESA citizen suits, ESA § 7(b)(3) and (b)(4) make it clear that economic interests are protected under ESA § 7. Accordingly, Petitioners meet the standard "zone of interests" test of whether "the interest sought to be protected by the complainant [is] arguably within the zone of interests to be protected or regulated by the statute" in question. *Clarke*, 479 U.S. at 396 (quoting *Data Processing Serv.*, 397 U.S. at 153). Contrary to Judge Reinhardt's miserly approach to the "zone of interests," the "test is not meant to be especially demanding." *Clarke*, 479 U.S. at 399. The test is not demanding in part because a plaintiff's interests only "arguably" must be within the zone of interests either "regulated" or "protected" by some aspect of the statute the plaintiff seeks to enforce. Petitioners meet both alternative tests. See *Westlands Water Dist.*, 850 F. Supp. at 1425 (if a "zone of interests" test applies, water interests which will be constrained under the authority of ESA § 7 meet that test for ESA § 7 challenges).

measures. See Pet. App. 3-4, 24-25, 32, 37-40. Petitioners challenge those minimum lake levels as a violation of ESA § 7 in their second claim for relief. Pet. App. 41. Hence, Petitioners' notice pleading brings potentially-viable ESA § 7(b)(3) and (b)(4) claims.

CONCLUSION

The judgment of the court of appeals should be reversed.

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(11)
No. 95-813

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

BRAD BENNETT, ET AL.

v.

Petitioners,

MARVIN PLENERT, ET AL.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF AMICI CURIAE IN SUPPORT OF PETITIONERS
FOR THE NATIONAL ASSOCIATION OF HOME BUILDERS
OF THE UNITED STATES, THE CALIFORNIA BUILDING
INDUSTRY ASSOCIATION, THE BUILDING INDUSTRY
LEGAL DEFENSE FOUNDATION, THE NATIONAL MULTI
HOUSING COUNCIL, THE NATIONAL APARTMENT
ASSOCIATION, AND THE NATIONAL ASSOCIATION OF
INDUSTRIAL AND OFFICE PROPERTIES**

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17728

TABLE OF CONTENTS

	PAGE(S)
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	3
A. ESA Standing Is A Critical Issue For Property Owners Throughout The Country	4
B. ESA Regulations Create Real Problems For Real People	6
C. The Ninth Circuit Decision Ignores The Will of Congress	9
D. The Ninth Circuit Decision Rewrites The Zone Of Interests Test	9
E. The Ninth Circuit Decision Closes The Courthouse Door On Regulated Parties	11
CONCLUSION	12

TABLE OF AUTHORITIES

CASES

	PAGE(S)
<i>Association of Data Processing Service Organizations, Inc. v. Camp</i> , 397 U.S. 150, 153 (1970)	9
<i>Agins v. City of Tiburon</i> , 447 U.S. 255 (1980) . .	1
<i>Babbitt v. Sweet Home Chapter of Communities for a Great Oregon</i> , 115 S.Ct. 2407 (1995) . . .	passim
<i>Bennett v. Plenert</i> , 63 F.3d 915 919 (1995)	passim
<i>Clarke v. Securities Industry Ass'n</i> , 479 U.S. 388 (1987)	10
<i>Dolan v. City of Tigard</i> , 114 S.Ct. 2309 (1994) .	1
<i>First English Evangelical Lutheran Church of Glendale v. County of Los Angeles</i> , 482 U.S. 304 (1987)	1
<i>Hazardous Waste Treatment Council v. Thomas</i> 885 F.2d 918, 922 (D.C. Cir. 1989)	11
<i>Lucas v. South Carolina Coastal Council</i> , 112 S.Ct. 2886 (1992)	1
<i>MacDonald, Sommer & Frates v. County of Yolo</i> , 477 U.S. 340, reh'g denied, 478 U.S. 1035 (1986)	1
<i>Mausolf v. Babbitt</i> , 913 F. Supp. 1334 (D. Minn. 1996)	12
<i>Nollan v. California Coastal Commn.</i> , 483 U.S. 825 (1987)	1
<i>Olmstead v. United States</i> , 277 U.S. 438 (1928)	3
<i>San Diego Gas & Electric Co. v. City of San Diego</i> , 450 U.S. 621 (1981)	1
<i>Valley Forge Christian College v. Americans United for Separation of Church and State</i> , 454 U.S. 469, 471 (1982)	11

PAGE(S)

<i>Williamson County Regional Planning Commission v. Hamilton Bank</i> , 473 U.S. 172 (1985)	1
<i>Yee v. City of Escondido</i> , 112 S.Ct. 1522 (1992)	1

STATUTES

16 U.S.C. §§1531-1544	3
16 U.S.C. §1532 (13)	9
16 U.S.C. §1536	10
16 U.S.C. §1536 (a)(2)	5
16 U.S.C. §1538	10
16 U.S.C. §1539	10
16 U.S.C. §1540 (g)(1)	9
33 U.S.C. §§1251-1387	5,11
33 U.S.C. §1344	5
42 U.S.C. §§6901-6992(k)	11
42 U.S.C. §§7401-7671q	5,11

REGULATIONS

50 C.F.R. §17.3	8
50 C.F.R. §17.95(a)	5

MISCELLANEOUS

59 Federal Register 5827 (1994)	5
59 Federal Register 13374 (1994)	5
59 Federal Register 58982-58990 (1994)	6
59 Federal Register 65256 (1994)	5
60 Federal Register 5893 (1995)	5
60 Federal Register 10694 (1995)	6
60 Federal Register 25882 (1995)	5
61 Federal Register (May 15, 1996)	4
Houston Post (August 28, 1994)	5,6
General Accounting Office, Endangered Species Act: Information On Species Protection on Non-Federal Lands (GAO) 4-5, (Dec. 1994)	4

The Building Industry Amici have received the written consent of the parties to file this brief in support of petitioners, and have filed the letters of consent with the Clerk of this Court.

INTEREST OF THE AMICI CURIAE

The National Association of Home Builders of the United States ("NAHB") represents more than 180,000 builders and associate members organized in approximately 850 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. Its members include not only people and firms that construct and supply single-family homes, but also apartment, condominium, commercial and industrial builders, as well as land developers and remodelers. It is the voice of the American shelter industry.¹

The California Building Industry Association ("CBIA") is a not-for-profit corporation organized under the laws of the State of California. CBIA represents over 5,000 members who employ over 100,000 people. CBIA's members are involved in all aspects of the building and construction industry.²

The Building Industry Legal Defense Foundation ("BILD") is a not-for-profit corporation organized under the laws of the State of California. The BILD is a wholly owned

¹ The NAHB has been before this Court either as an *amicus curiae* in support of, or as of counsel on behalf of, the property owner in prior cases involving government land use decisions. *Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994); *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992); *Yee v. City of Escondido*, 112 S.Ct. 1522 (1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, *reh'g denied*, 478 U.S. 1035 (1986); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980). The NAHB brief was cited approvingly in this Court's *Nollan* opinion, 483 U.S. at 840.

² NAHB, CBIA, and the Building Industry Association of Southern California are affiliated trade associations working in concert for the benefit of the entire home building industry.

subsidiary of the Building Industry Association of Southern California ("BIA-Southern California"). BIA-Southern California is an NAHB affiliate with over 1400 members involved in all aspects of the building and construction industry. BIA-Southern California members are involved in the construction of 70% of all new homes in the Southern California Region.³

The National Multi Housing Council ("NMHC") represents the interests of the Nation's largest owners and operators of multifamily rental housing, including ownership, building, financing, and management involving millions of rental housing units. Since its formation in 1978, the NMHC has been actively involved in all facets of public policy that are of strategic importance to participants in the multifamily housing industry.

The National Apartment Association ("NAA") brings together state and local associations of owners, builders, investors, developers, and managers of multifamily properties. It provides education and training for the multifamily industry and works on local, state, and national legislative issues. NAA represents over 26,000 members who own and manage over 3 million multifamily units nationwide.

The National Association of Industrial and Office Properties ("NAIOP") is a professional organization of 5,000 individuals engaged in owning, managing, and developing industrial and office buildings in the United States and around the world. NAIOP's members include commercial real estate developers, architects, brokers, master planners, engineers, property managers, banks, and insurance companies.

The Building Industry Amici's interests lie in seeing that the implementation of laws concerning or affecting the use of private property remains consistent, fair, and cognizant of the need to protect the rights of the individual when confronted with

³ The BILD's mission is to "[d]efend the legal rights of home and property owners." The BILD promotes and supports legal cases to secure a body of favorable court decisions for its members specifically, and property owners and developers generally.

government actions which impinge on constitutional guarantees.⁴ The Building Industry Amici have a particular interest in the administration of federal environmental statutes such as the Endangered Species Act of 1973 ("ESA"), 16 U.S.C. §§1531-1544, given the far-reaching impact that these laws have upon private land use and land-use regulation.

SUMMARY OF ARGUMENT

The effect of the Ninth Circuit's decision is to remove any judicial check on the Interior Department's administration and enforcement of the ESA. The Ninth Circuit would close the courthouse doors to regulated parties who bear the burdens of ESA regulation and give free rein to environmental groups to encourage and, indeed, force the ESA's expansion. This result, stripping regulated parties of any means to defend themselves, is without precedent. This Court should reverse the Ninth Circuit's decision.

ARGUMENT

The United States Court of Appeals for the Ninth Circuit's decision held that "only plaintiffs who allege an interest in the preservation of endangered species fall within the zone of interests protected by the ESA."⁵ According to that court:

Given that the clear purpose of the ESA is to ensure the protection of endangered species, we conclude that suits by plaintiffs who are interested only in avoiding

⁴ As Justice Brandeis insightfully admonished:

Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

⁵ *Bennett v. Plenert*, 63 F.3d 915, 919 (1995).

the burdens of that preservation effort "are more likely to frustrate than to further statutory objectives." ⁶

As argued below, the issue of standing to challenge ESA determinations is of critical importance to property owners generally, and the Building Industry Amici's members specifically. The Ninth Circuit has neutered property owners' ability to protect themselves in court from unlawful ESA regulation. Moreover, the Ninth Circuit only reached its decision by ignoring the will of Congress and by rewriting this Court's prudential standing test.

A. ESA Standing Is A Critical Issue For Property Owners Throughout The Country

The impact of the Ninth Circuit's decision cannot be understated. As this Court recognized in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S.Ct. 2407 (1995), the ESA provides for the federal regulation of land which constitutes endangered species' habitat. As of May 1993, 90% of the 781 species listed as endangered or threatened under the ESA inhabit non-federal lands. Of these listed species, 517 have over 60% of their total habitat on non-federal lands. ⁷

The habitat for these species and the 185 species that have been listed as endangered or threatened since May 1993 covers tens of millions of acres, much of it private property, and hundreds, if not thousands, of river miles. The Secretary has already designated critical habitat for some 115 species covering millions of acres. ⁸ The designation of such critical habitat imposes on all

⁶ *Bennett*, 63 F.3d at 919.

⁷ See General Accounting Office, *Endangered Species Act: Information on Species Protection on Non-Federal Lands*, 4-5 (Dec. 1994).

⁸ For example, the Secretary has designated approximately 6.9 million acres as critical habitat for the Northern spotted owl in this case. The Secretary has also designated 3.9 million acres as critical habitat for the marbled murrelet, 61 *Fed. Reg.* (decision announced on May 15,

(footnote continues)

federal agencies an obligation to ensure that their actions will not result in the adverse modification of that critical habitat 16 U.S.C. §1536(a)(2). This obligation extends to all types of federal actions, including actions relating to private property, e.g., federal funding for state, local, and private projects; issuance of federal permits to discharge dredged or fill material into wetlands and other waters of the United States pursuant to Section 404 of the Clean Water Act, 33 U.S.C. §1344; issuance of other permits under the Clean Water Act, 33 U.S.C. §§1251-1387; and the Clean Air Act, 42 U.S.C. §§7401-7671q; and, the provision of federal flood insurance.⁹ These prohibitions are likely to be extended to tens of millions of additional acres in the future as the Secretary designates critical habitat for some of the 800 endangered and threatened species currently lacking critical habitat designations or some of the more than 3000 species that are currently candidates for listing under the ESA. ¹⁰

(footnote continued)

1996); 4.6 million acres for the Mexican spotted owl, and its tributaries, 59 *Fed. Reg.* 5827 (1994); and 6.3 million acres for the gray wolf, 50 C.F.R. §17.95 (a). In addition, the Secretary has designated 1,980 miles of the Colorado River as critical habitat for four fish species, 59 *Fed. Reg.* 13374 (1994); and has designated the entire Sacramento — San Joaquin River delta — which lies at the heart of the water system serving much of the State of California — as critical habitat for the delta smelt, 59 *Fed. Reg.* 65256 (1994).

⁹ Thus, no comfort can be drawn from the Ninth Circuit's disclaimer that it was not ruling on the standing of directly regulated parties, but rather only on indirectly regulated parties. *Bennett*, 63 F.3d at 917, fn. 2. The effect of an ESA regulation upon the regulated party is just as real even when filtered through another federal agency.

¹⁰ For instance, the Secretary has proposed to designate 860,000 acres of lake, stream and shoreline for the Lost River sucker and the shortnose sucker, 60 *Fed. Reg.* 5893 (1995), and 20,000 acres on 210 miles of coastline (10% of the California, Oregon and Washington coastline) for the Western snowy plover, 60 *Fed. Reg.* 25882 (1995). The Secretary at one time considered a proposal to designate portions of 33 Texas counties as critical habitat for the Golden-cheeked Warbler. Scott Harper, *Endangered: Species or*

(footnote continues)

The designation of critical habitat, particularly on this scale, can have significant environmental impacts on property owners. However, due to their "competing interest"¹¹ (i.e. — the desire to use their land), property owners under the jurisdiction of the Ninth Circuit will not be able to challenge critical habitat designations under the ESA.

B. ESA Regulations Create Real Problems For Real People

The burdens imposed by the ESA upon individuals, as well as upon state and local governments, are neither hypothetical or imagined; indeed, the following examples illustrate that these burdens are not overstated.

For instance, the listing of the Delhi Sands Flower-loving Fly ("Fly") resulted in the United States Fish & Wildlife Service ("Service") requiring San Bernardino County to move the "footprint" of its new County Medical Center 250 feet in order to lessen the impact of construction upon an estimated 6-8 Flies. This requirement cost San Bernardino County citizens more than \$4,000,000.00, approximately \$500,000.00 per Fly.¹² The Service also demanded that San Bernardino County close Interstate 10 during the months of August and September annually, or, alternatively, to lower the speed limit to 15 m.p.h.¹³ The

(footnote continued)

Rights, Houston Post, August 28, 1994 at A1. Other newly listed and candidate species also have extensive ranges. The Southwestern willow flycatcher is thought to inhabit portions of seven states. 60 *Fed. Reg.* 10694 (1995). The Northern goshawk, a species which the Secretary has determined may warrant listing as endangered or threatened, is found throughout much of the conterminous United States. See 59 *Fed. Reg.* 58982, 58990 (1994) (goshawk historically has nested in 26 states and regularly visited 19 others).

¹¹ *Bennett*, 63 F.3d at 921.

¹² The application of these monies to the provision of healthcare would have treated 522 inpatients or 24,993 outpatients.

¹³ Interstate 10 is an eight lane freeway providing the primary road access to Los Angeles from the east. The apparent thinking by the Service was that a Fly could wander onto the highway only to be struck by a passing

(footnote continues)

Service is also currently blocking the improvement of a road intersection critical to providing emergency access to the new County Medical Center.¹⁴

The Service's decision to restrict logging in Arizona's Kaibab National Forest as a measure of affording protection to the Mexican Spotted Owl has virtually destroyed the Kaibab Forest Products Company. The Service closed approximately 30,000 acres to logging operations, a decision affecting 10 owls. The provision of almost 3,000 acres per owl cost Kaibab Forest Products Company more than \$3,000,000.00. Moreover, over 1400 people lost their jobs due to the company's sudden inability to harvest timber.

Twenty-eight families lost their homes in Riverside County, California when the Service refused to let them clear fire-breaks to protect their homes from wildfires. The Service's position was that the vegetation removal inherent in clearing fire-breaks would destroy habitat for the Stephens Kangaroo Rat.¹⁵ These families who heeded the Service's threats of criminal and civil sanctions ended up losing their habitat.

On August 18, 1993, the Service listed as endangered two (2) so-called "cave bugs" — the Coffin Cave Mold Beetle and the Bone Cave Harvestman — without undergoing any of the requisite notice and comment procedures. The listing of the Bone Cave Harvestman forced Austin, Texas home builder Ed Wendler, Jr. to set aside 90 acres of real property for the benefit

(footnote continued)

motor vehicle. This accidental contact would, technically speaking, result in a "take" of the Fly in violation of 16 U.S.C. §1538 (a)(1)(B).

¹⁴ NAHB, CBIA, BILD, Colton, Fontana, and San Bernardino County, California have filed an action against Secretary Babbitt — *NAHB v. Babbitt*, Civ. No. 1:95CV01973 RMU (D.D.C. 1995) — challenging the Interior Department's authority to enforce certain provisions of the ESA in connection with its listing of the Fly as endangered. That action involves standing issues similar to those raised by petitioners in this case.

¹⁵ This ignores, of course, the fact that fires would accomplish the same result.

of this "cave bug". The cost of the land alone was \$1,170,000.00.¹⁶ This loss was the direct result of an endangered species listing by "executive fiat" in violation of the ESA.¹⁷

Finally, the Sierra Club — a group not adversely affected by the Ninth Circuit's decision — sued pursuant to the ESA's citizen suit provisions to block development in San Antonio, Texas based upon the potential impact on the Edwards Aquafier. The Aquafier is not only a major source of water for the region, it is also the habitat of the Texas Blind Salamander and the San Marcos Salamander. The effect of that suit and its remedy will be to tie up thousands of acres of private property.

All of these actions, and many more, were administrative actions taken by the Service pursuant to the ESA. Most all Service actions concerning "habitat" arise from the regulatory definitions contained in 50 C.F.R. §17.3.¹⁸ The regulations are not promulgated by Congress, nor are the regulations subjected to Congressional review. Thus, in light of the fact that regulations are promulgated, administered, and enforced by the Executive Branch, the judicial branch is the only place where aggrieved regulated parties can turn for relief.

¹⁶ Other costs include more than \$100,000.00 which Mr. Wendler was forced to spend on biological surveys, as well as lost profits for the anticipated construction and sale of homes lost to "cave bug" preservation.

¹⁷ The NAHB and its affiliate, the Texas Capitol Area Builders Association ("TxCBA"), have challenged this action. In *NAHB and TxCBA v. Babbitt*, C.A. No. 1:95CV01374 RMU (D.D.C. 1995), the district court has been asked to invalidate a final rule listing 2 species as endangered under the ESA which was promulgated without undergoing the requisite notice and comment process. The Interior Department has challenged NAHB's and TxCBA's standing to bring this action predicated upon the Ninth Circuit's decision.

¹⁸ The Service's regulatory definition of "harm" was the subject of this Court's decision in *Sweet Home*.

C. The Ninth Circuit Decision Ignores The Will Of Congress

The Building Industry Amici agree with petitioners that it was error for the Ninth Circuit to apply the zone of interests test to the subject ESA claims. Congress clearly and unequivocally extended standing under the ESA to the limits of Article III of the United States Constitution through its enactment of 16 U.S.C. §1540 (g)(1). That provision allows *any* person to bring suit to challenge the Secretary's actions under the ESA.

The term "person" is liberally defined in the ESA to mean:

an individual, corporation, partnership, trust, association, or any other private entity, or any officer, employee, agent, department or instrumentality of the Federal government, of any state or political subdivision thereof, or any foreign government.

16 U.S.C. §1532 (13). Notably, there is no qualification within this definition such as to exclude a "person" with a "competing interest" or to restrict standing to a person who *only* seeks to further the ESA's statutory objectives. Rather, the standing conferred under the ESA is broad, open-ended, and inclusive.

D. The Ninth Circuit Decision Rewrites The Zone Of Interests Test

Assuming *arguendo* that the zone of interests test does indeed apply to ESA claims, the Ninth Circuit's decision misapplied the test completely, rewriting the test so as to exclude those persons *regulated* by the ESA.¹⁹ This is contrary to this Court's clear mandate that the zone of interests test included those whose interests are sought to be protected which fall within either the "zone of interests to be protected *or* regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S.

¹⁹ This group would include not only petitioners, but the Building Industry Amici's members, as well as most all property owners and users generally.

150, 153 (1970). See also *Clarke v. Securities Industry Ass'n.*, 479 U.S. 388 (1987).

Both petitioners and the Building Industry Amici's members clearly fall within the category of those Congress intended to regulate under the ESA. Through the "take" provisions contained in 16 U.S.C. §1538, along with the permitting provisions of 16 U.S.C. §§1536 and 1539, and the accompanying regulations, the ESA acts to closely regulate the use of land which may be occupied by listed endangered species.²⁰ Individuals are prohibited from harming endangered animals, including habitat modifications which significantly impair an animal's behavioral partners. See *Sweet Home*, 115 S.Ct. 2407 (1995). These provisions become effective as soon as a species is listed as endangered, requiring landowners to immediately conform their conduct to this requirement.²¹ Therefore, there can be no argument that petitioners are regulated by the ESA. As such, petitioners should have standing to challenge ESA determinations in court.

²⁰ The "use of land" is, of course, the foundation — both literally and figuratively — of the building and construction industry. Moreover, in this case, petitioners are regulated in their use of the water which constitutes the habitat of the Lost River sucker and the short nose sucker.

²¹ As this Court noted, the ESA "encompasses a vast array of economic and social enterprises and endeavors." *Sweet Home*, 115 S.Ct. at 2418.

E. The Ninth Circuit Decision Closes The Courthouse Door On Regulated Parties

The United States Constitution, Article III, limits the jurisdiction of the federal courts to the resolution of "cases" or "controversies". *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 469, 471 (1982). Common sense dictates that the essence of an "actual case or controversy" would necessarily involve the existence of "competing interest[s]". The Ninth Circuit, however, in its zeal to ensure the primacy of endangered species protection, prevents any meaningful challenge to the Secretary's actions. By virtue of its decision, only those "persons" without any "competing interest[s]" will be allowed to bring a court challenge under the ESA. Thus, while environmental interest groups will be free to act to enforce the ESA to its maximum potential, those "persons" who bear the burden of the ESA regulation — property owners — will be at the mercy of the Department of the Interior.²² In the event that a species is mistakenly or improperly listed, the regulated parties who have an interest in correcting the mistake, will be forced to rely upon the non-regulated parties who have no interest in (and, indeed, may be opposed to) correcting the mistake.²³

²² "Those whom the agency regulates have the incentive to guard against any administrative attempt to impose a greater burden than that contemplated by Congress." *Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918, 922 (D.C. Cir. 1989).

²³ Nor is the ESA the only environmental statute potentially affected by the Ninth Circuit's ruling. The Clean Water Act, 33 U.S.C. §§1251-1387, Clean Air Act 42 U.S.C. §§7401-7671(q), and Resource Conservation and Recovery Act, 42 U.S.C. §§6901-6992(k), all contain broadly worded citizen suit provisions similar to that contained in the ESA. Assuming *arguendo* the correctness of the Ninth Circuit's decision, there is no logical impediment to its extension to these statutes, preventing regulated parties from challenging administrative actions. The end result will be to insulate federal agencies from any check upon their actions by adversely affected parties.

The ability to protect one's interests in court historically has constituted a fundamental American right. Yet the Ninth Circuit's decision in this case abrogates that right for those who possess a "competing interest" with an endangered species. In other words, property owners will have to trust the Department of the Interior to administer the ESA in a manner which does not infringe upon their rights.²⁴ Moreover, environmental groups who may oppose property development and growth will be able to use the ESA as a weapon to prevent property owners' activities; the property owners, however, will be without the means to defend themselves.

CONCLUSION

Therefore, for the reasons stated above, and in the Brief for Petitioners, the Building Industry Amici pray that this Court REVERSE the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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²⁴ Based upon past actions, there is little basis for property owners to "trust" the Interior Department. Indeed, on at least (1) occasion, the Interior Department has taken the position that when it acts for the benefit of endangered species, its actions are immune from challenge, and not subject to judicial review. See *Mausolf v. Babbitt*, 913 F. Supp. 1334, 1342 fn. 13 (D. Minn. 1996). In *Mausolf*, the District Court rejected the Interior Department's dubious claim, stating that it was "unwilling to adopt the view that the FWS [Service] is unrestrained if it cloaks any of its acts in the laudable robe of endangered and threatened species protection. This is a form of totalitarian virtue. . . ." *Mausolf*, 913 F. Supp. at 1342. The reversal by this Court of the Ninth Circuit's decision is absolutely necessary to protect property owners from the Interior Department's "totalitarian virtue."

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May 24, 1996

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CLERK

No. 95-813

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

BRAD BENNETT, *et al.*,

Petitioners,

v.

MARVIN PLENERT, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE
THE NATIONWIDE PUBLIC PROJECTS COALITION,
THE NATIONAL RURAL ELECTRIC COOPERATIVE ASS'N.,
GRANITE CONSTRUCTION CO. (CA), W. SAN BERNARDINO
COUNTY (CA) WATER DISTRICT, THE CITY OF SAFFORD (AZ),
THE FIRE ISLAND (NY) ASS'N., SEMITROPIC WATER STORAGE
DISTRICT (CA), METRO. DENVER WATER AUTHORITY (CO),
DRAKE HOMES, INC. (CA), WHEELER-RIDGE MARICOPA WATER
STORAGE DISTRICT (CA), SACRAMENTO COUNTY (CA),
RESCUE UNION SCHOOL DISTRICT (CA), KERN COUNTY WATER
AGENCY (CA), KERN COUNTY (CA), HELIX WATER DISTRICT
(CA), AND RANCHO CALIFORNIA WATER DISTRICT (CA)
IN SUPPORT OF PETITIONERS

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4514

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iv
INTERESTS OF THE <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	10
ARGUMENT	12
I. CONGRESS DID NOT INTEND TO PREVENT CITIZENS FROM CHALLENGING OVERLY ZEALOUS AND UNSCIENTIFIC IMPLEMEN- TATION OF THE ESA	12
II. THE NINTH CIRCUIT'S OPINION LIMITS COURT REVIEW OF COMPLIANCE WITH THE ESA POLICY THAT FEDERAL AGENCIES "SHALL COOPERATE WITH STATE AND LOCAL AGENCIES TO RESOLVE WATER RE- SOURCE ISSUES IN CONCERT WITH CONSER- VATION OF ENDANGERED SPECIES"	14
III. THE NINTH CIRCUIT'S RULING WOULD PRECLUDE <i>AMICI</i> FROM ASSERTING PRO- CEDURAL RIGHTS RECOGNIZED IN <i>LUJAN</i> , AND THWART <i>AMICI</i> 'S PROPRIETARY RIGHT TO PROTECT AND MANAGE PUBLIC RESOURCES	16

A.	Footnote 7 of <i>Lujan v. Defenders of Wildlife</i> recognizes standing under the ESA to protect concrete procedural interests	16
B.	At least one Court of Appeals has also recognized a State's standing to sue under the ESA to protect its proprietary interests as an owner and manager of lands under its jurisdiction	19
IV.	EVEN THE NINTH CIRCUIT, CONSISTENT WITH THE RULINGS OF THIS COURT, HAS ACKNOWLEDGED THAT THE "ZONE OF INTEREST" TEST IS NOT ONE OF "UNIVERSAL APPLICATION" IN CASES WHICH ARE NOT REVIEWED UNDER THE ADMINISTRATIVE PROCEDURE ACT	21
V.	FUNDAMENTAL FAIRNESS AND MAINTAINING COMPREHENSIBLE RULES OF COURT ACCESS DICTATE REVERSAL OF THE NINTH CIRCUIT'S DECISION	24
A.	The "zone of interest" test as applied by the Ninth Circuit creates convoluted distinctions among classes of affected persons and should be discarded where, as here, citizen suit jurisdiction is sought to compel the performance of non-discretionary statutory duties	24

B.	If the Ninth Circuit's decision is affirmed, State and local governments and public resource agencies could be compelled to expend taxpayers' money without any ability to challenge arbitrary impositions by the Federal government	25
CONCLUSION		27
APPENDIX A (Citizen Suit Provisions In Environmental Statutes)		A-1
APPENDIX B (Decisions Finding Explicit Or Implicit Standing In Cases Under Various ESA Provisions)		B-1

TABLE OF AUTHORITIES

Cases

<i>Association of Data Processing Serv. Orgs., Inc. v. Camp</i> , 397 U.S. 150 (1970)	12, 21
<i>Bennett v. Plenert</i> , 63 F.3d 915 (9 th Cir. 1995)	<i>Passim</i>
<i>Building Indus. Ass'n v. Babbitt</i> , C.A. No. 1:95CV00726 (PLF) (D.D.C.) (pending)	9
<i>California v. Block</i> , 690 F.2d 753 (9 th Cir. 1982)	18
<i>Clarke v. Securities Indus. Ass'n</i> , 479 U.S. 388 (1987)	22
<i>Davis v. Coleman</i> , 521 F.2d 661 (9 th Cir. 1975)	18
<i>Douglas County v. Babbitt</i> , 48 F.3d 1495 (9 th Cir. 1995), <i>cert. denied</i> , ___ U.S. ___, 116 S.Ct. 698 (1996)	11, 17, 18-20, 22
<i>Endangered Species Comm. of the Bldg. Indus. Ass'n v. Babbitt</i> , 852 F.Supp. 32 (D.D.C. 1994)	27
<i>Friends of the Earth v. United States Navy</i> , 841 F.2d 927 (9 th Cir. 1988)	17, 18
<i>Gladstone Realtors v. Bellwood</i> , 441 U.S. 91 (1979)	12
<i>Hazardous Waste Treatment Council v. EPA</i> , 885 F.2d 918 (D.C. Cir. 1989)	23
<i>Idaho Farm Bureau Fed'n v. Babbitt</i> , 58 F.3d 1392 (9 th Cir. 1995)	27
<i>Idaho v. ICC</i> , 35 F.3d 585 (D.C. Cir.)	11, 20
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992)	11, 16, 18
<i>Lujan v. Nat'l Wildlife Federation</i> , 497 U.S. 871, 883 (1990)	22

<i>Mausolf v. Babbitt</i> , 913 F.Supp. 1334 (D.Minn. 1996)	27
<i>National Ass'n of Home Builders v. Babbitt</i> , C.A. No. 1: 95 CV 01973 (RMV) (D.D.C.) (pending)	6
<i>Pacific NW Generating Co-Op v. Brown</i> , 38 F.3d 1058 (9 th Cir. 1994)	17, 18, 25, 26
<i>PUD No. 1 of Jefferson County v. Washington Dep't. of Ecology</i> , ___ U.S. ___, 114 S. Ct. 1900 (1994)	15
<i>United States v. Glenn-Colusa Irrigation Dist.</i> , 788 F.Supp. 1126 (E.D. Cal. 1992)	15
<i>Westlands Water Dist. v. United States. Dept. of Interior</i> , 850 F.Supp. 1388 (E.D. Cal. 1994)	15

STATUTES

Administrative Procedure Act, 5 U.S.C. §§ 701-706	21-24
<i>Clean Water Act</i> 33 U.S.C. § 1251(g)	15
<i>Endangered Species Act, as amended</i> <i>Section 2</i> 16 U.S.C. § 1531	10, 11, 14
<i>Section 4</i> 16 U.S.C. § 1533(b)(1)(A)	6
16 U.S.C. § 1533(b)(2)	6, 19
<i>Section 6</i> 16 U.S.C. § 1535(a)	14
<i>Section 7</i> 16 U.S.C. § 1536(a)(2)	6
16 U.S.C. § 1536(b)	19
<i>Section 11</i> 16 U.S.C. § 1540(g)(1)	10, 12, 14, 15, 24

<i>Solid Waste Disposal Act:</i>	
42 U.S.C. §6972(a).....	24

REGULATIONS

51 Fed. Reg. 16,482 (May 2, 1986).....	6
56 Fed. Reg. 54,967 (Oct. 23, 1991).....	10
58 Fed. Reg. 49,887 (Sept. 23, 1993).....	5
59 Fed. Reg. 48,136 (Sept. 19, 1994).....	8

MISCELLANEOUS

United States Supreme Court Rule 37.3.	1
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INTERESTS OF THE AMICI CURIAE

The *amici* are public sector agencies and associations, local governments, and private entities that provide essential services to the public.¹ The *amici* include:

Nationwide Public Projects Coalition (NPPC), a not-for-profit corporation whose members include state, regional and local government agencies and associations, and private sector entities. Its members furnish basic public services such as water supply, irrigation, flood control, transportation and other infrastructure facilities. NPPC strives for balance between environmental protection and the provision of essential public services.

The National Rural Electric Cooperative Association, a not-for-profit national service organization that represents approximately 1000 rural electric cooperatives (RECs) that provide central station electric service to approximately 30 million consumers in 46 states. Over the past five years, RECs have undertaken over 1500 projects—including building and upgrading power generation, administration, and transmission facilities—that require ESA compliance in securing USDA loans or loan guarantees.

Granite Construction Company, a large nationwide contractor and materials supplier to public and private projects that have been delayed and rendered more costly by ESA requirements.

West San Bernardino County Water District (WSBCWD), a public agency established under the California Water Code that provides domestic and fire protection water to 45,000 southern California residents. It

¹ The parties have consented to the filing of this brief. The *amici* have filed letters of consent with the Clerk pursuant to this Court's Rule 37.3.

arising from the listing of an endangered fly species. See *infra* at 5-6.

The City of Safford, a municipal corporation in southeast Arizona, that provides water to its 18,000 residents, businesses, churches, schools, a state prison and a community college. A 1993 flood severely damaged their water supply facility. ESA restrictions imposed costly delays on the emergency repair process. See *infra* at 9-10.

The Fire Island Association, Inc., a league of 18 property owner associations located on Fire Island, New York, a roadless barrier island subject to overwashes and breaching from the Atlantic Ocean. The Association is particularly concerned over FWS restrictions to protect the habitat of the endangered Piping Plover, which will prevent or preclude beach nourishment projects needed to prevent storm damage and respond to emergency breaches. See *infra* at 7-8.

Semitropic Water Storage District (STWSD), located in the San Joaquin Valley, supplies irrigation water to 221,000 acres in and around Kern County, California. The ESA has increased STWSD's operation, maintenance, and energy costs for transporting and "banking" water and has required the set-aside of lands for species preservation through the Kern County Habitat Conservation Plan.

Metropolitan Denver Water Authority (MDWA), a political subdivision and public corporation of the State of Colorado. MDWA, made up of 20 local governments working to develop water supplies for the Greater Metropolitan Denver, Colorado area, serves more than 300,000 persons. The permits it needs to construct water facilities in the arid Denver region are subject to frequent ESA regulation.

Drake Homes, Inc., a land development and single-family home construction business, serving northern California. Drake owns several thousand acres in the Chico

Drake Homes, Inc., a land development and single-family home construction business, serving northern California. Drake owns several thousand acres in the Chico area, which contain some 700 acres of "vernal pools" that have historically been habitat for several species of ESA-protected Fairy Shrimp.

Wheeler Ridge-Maricopa Water Storage District (WRMWSO), a water storage district and political subdivision of the State of California, encompassing 228 square miles of agricultural lands south of Bakersfield. WRMWSO Farming activities and water supply facilities have been impacted by the ESA "harm" regulation—including negotiations to develop three Habitat Conservation Plans for various portions of Kern County.

Sacramento County (CA), a political subdivision of California located in an area known as the "Central Valley," owns or manages large tracts of land which contain "vernal pools," habitat of several species of ESA-listed Fairy Shrimp. Because of the decision to list these species, the County has faced significant problems in implementing land management decisions to protect vernal pools, as well as planning for an important landfill to serve the needs of County residents. See *infra* at 9.

Rescue Union School District, an elementary school district covering 52 square miles of El Dorado County, California, has adopted a \$46 million facilities plan to accommodate its rapid growth. The District has experienced significant delays and expense in construction of a new West Campus, which is critical to that plan, because of the need to sample for Fairy Shrimp species which may inhabit numerous "vernal pools" located on the Campus site. See *infra* at 9.

Kern County Water Agency (KCWA), a political subdivision of the State of California, charged with the management of water supply and quality in what was once the third most productive agricultural county in the U.S. Numerous KCWA projects have been delayed, blocked, or made significantly more costly due to legally questionable ESA implementation. For example, ESA-mandated delays in the construction of 19 new wells and the use of various existing wells in areas of *potential* habitat for the ESA-listed Tipton Kangaroo Rat significantly impeded KCWA's 1991 Emergency Ground Water Recovery Program.

Kern County (CA) covers more than 8,000 square miles of desert mountain and valley terrain and has a population of more than 600,000. Kern County has 20 ESA-listed species and has had to expend considerable funds to protect such species, including \$26 million per year for the Southwestern Willow Flycatcher, resulting in increased water and electric rates for County residents.

Helix Water District, serving 50 square miles and a quarter million people in the heart of San Diego County, California. To satisfy federal drinking water requirements and meet future demands, Helix must expand the capacity of its treatment plant to 106 million gallons per day. In connection with the expansion, Helix is required to purchase land, requiring perpetual payments for maintenance, as part of an expensive mitigation program for an endangered bird species.

Rancho California Water District (RCWD) provides water and sewer service over a 150 square mile area in southwestern Riverside County, California. Sixty thousand residents and 18,000 businesses rely on RCWD for potable water. The ESA has delayed and driven up

costs on numerous capital improvement projects undertaken by RCWD.

The impact of this case on the *amici*, and on the public they serve, is potentially massive. Over-regulation by the Fish and Wildlife Service (FWS) of hypothetical "takes" of species under its "harm" regulation; unnecessary and scientifically insupportable listings of species; and unjustifiably onerous jeopardy determinations and biological opinions, all affect public and private uses of land and water resources throughout the United States. If impacted public agencies and private landowners are denied the opportunity to challenge overzealous regulation under the ESA, severe negative consequences will result. The *amici* submit several examples of apparent FWS abuses of authority—which, if the *Bennett* decision is upheld, will continue unchecked and be encouraged to proliferate:

1. *West San Bernardino County Water District (Water District)*: In the summer of 1993, the Water District determined that it needed to locate a domestic water supply well to respond to a prevailing drought. Between the time a well was drilled in the City of Rialto and ancillary equipment and user connections were installed, FWS announced the listing of the Delhi Sands Flower-Loving Fly (the Fly) as an endangered species. 58 Fed. Reg. 49,887 (Sept. 23, 1993). FWS subsequently advised the District it would prohibit all activities on the well site, pursuant to its "policy...to consider all areas on Delhi Sands with suitable...habitat as occupied" by the Fly—while admitting that its experts could find no Flies on the Lot in 1994. FWS warned the Water District that any disturbance of the "habitat" on the 80' by 120' Lot would "take" the Fly and violate ESA § 9. The Water District's

entomologist determined that no flies existed on the site, that the nearest Fly nest was over half a mile away, and that the site, at best, contained degraded habitat. Although the ESA directs that listing, habitat designation, and inter-agency consultations be carried out using "best available scientific data,"² under the ruling below, the Water District would be powerless to challenge FWS's actions as lacking adequate scientific support.³

2. *Los Angeles County Department of Public Works (LACDPW)*: In June 1992, LACDPW (a member of NPPC, but not itself separately an *amicus*) developed the San Gabriel Canyon Sediment Management Plan (SMP) to remove sediment from a system of three reservoirs operated by LACDPW. These aging reservoirs have lost approximately 25% of their original storage and flood protection capacity from sediment deposition. If more sediment is allowed to accumulate, there is a danger that runoff from a major storm would exceed the channel's design capacity and cause extensive flood damage.

Without any evidence of species present, FWS criticized LACDPW's preferred sediment management alternative, speculating that there might be impacts on potential habitat of the Least Bell's Vireo (an ESA-listed endangered bird species; see 51 Fed. Reg. 16,482 (May 2, 1986)) and on the Two-Striped Garter Snake (a species proposed for listing under the ESA).

² 16 USC §1533(b)(1)(A)(listing determinations); *id.* §1533(b)(2) (critical habitat designations); *id.* §1536(a)(2) (interagency cooperation).

³ The National Association of Home Builders recently filed suit challenging the listing of the Fly. *National Ass'n of Home Builders v. Babbitt*, C.A. No. 1: 95 CV 01973 (RMV) (D.D.C.) (pending).

LACDPW then performed additional environmental analyses (at a taxpayer cost of an additional \$151,000) demonstrating that the project area was uninhabited by either Snake or Bird. In response, FWS demanded more field surveys for other endangered, threatened and candidate species, and insisted that the County select the most expensive alternative: construction of a slurry pipeline at an anticipated cost of \$164 million—ten times the cost of the County's preferred alternative.

While FWS continues to require more data on more species that "may occur" in the area, the public safety of L.A. County residents is being compromised by the delay in completing this critically-needed project. Because LACDPW cannot finance FWS's preferred alternative and required mitigation, it may be forced to remove one or more of the reservoirs from service. The *Bennett* decision would foreclose any avenue of legal challenge to these FWS determinations.

3. *Fire Island, New York*: The south shore communities of Long Island, NY, including the incorporated Villages of Ocean Beach and Saltaire on Fire Island, have been ravaged by harsh storms in recent years. The winter nor'easters of 1992-93 caused over \$230 million in damage to homes, businesses and infrastructure in the downstate region. Fire Island, one of the barrier islands protecting the Long Island mainland and the Great South Bay (a major shellfishery and recreational resource) from the Atlantic Ocean, has endured significant erosion damage due to such storms. As a result, serious "breaches"⁴ of Fire Island from Atlantic inundation are an

⁴ Barrier islands like Fire Island are narrow and can be overwashed by ocean waves in severe coastal storms. Unattended overwashes become "breaches," wherein water flows at shallow depths from ocean to bay continuously at low tide. Breaches, in turn, are widened and deepened by

imminent possibility. As breaches get larger, they can quickly become new "inlets," splitting the barrier island in half.

In 1994, a Task Force appointed by then-Governor Cuomo endorsed a Corps of Engineers plan to provide emergency beach nourishment (Breach Contingency Plan), for barrier islands overwashed by Atlantic storms, while providing special protection for the ESA-listed Piping Plover and other species. In addition, an interim beach nourishment program for Fire Island is being advanced by the Corps of Engineers, pending completion of the Corps' long-term \$14 million "Reformulation" study covering an 83-mile coastal stretch.

FWS now objects to the placement of sand under the Interim Plan in some areas of the Fire Island National Seashore (FINS), out of concern for actual or possible Plover habitat. The Association is very concerned that the FWS's refusal to allow the emergency placement of sand along parts of the FINS, pending completion of the long-term study, could make a breach more likely to occur, and cause significant delays in reaching a permanent solution to these problems. This could result in millions of dollars in damage to property and infrastructure, and pose threats to public safety. The *Bennett* decision would leave the Association without any recourse to contest FWS's decisions.

4. *Abuses Related to the Fairy Shrimp*: The listing of several species of fly-sized crustaceans known as Fairy Shrimp (see 59 Fed. Reg. 48,136 (Sept. 19, 1994)), has

(..continued)

natural hydraulic forces and can quickly become new "inlets," or passage-ways between two islands connecting ocean to bay.

had a major impact on property owners in California's Central Valley.

Amici Sacramento County and the Rescue Union School District have been forced to battle FWS over listing of the Shrimp. The County has incurred substantial costs and delays to sample numerous vernal pools for the presence of these species before it could move forward with a vital landfill project. Increased costs will likely be passed on to County residents, and the delays have heightened concern over the adequacy of refuse disposal services. Moreover, the Fairy Shrimp listing has impeded the County's own land use program to manage vernal pool habitat within its jurisdiction. The School District has also experienced substantial expense from the Fairy Shrimp listing. The District has been required to hire a biologist and sample a single vernal pool on its property 17 times, before it could proceed with an expansion to its campus. No Shrimp were ever located. This has delayed the District's program to build a new West Campus, which is critical to the District's \$46 million facilities plan to accommodate its rapid growth. The County and the School District are among the plaintiffs in pending litigation with the FWS over the decision to list the species.⁵

5. *City of Safford, Arizona*: The City of Safford is a community of 18,000 whose primary source of water is Bonita Creek. In January 1993, a major flood struck Safford, severely damaging the Bonita Water System. As soon as flood waters receded, the City retained an engineer to make emergency repairs, with the aid of the Federal Emergency Management Agency (FEMA).

⁵ A coalition of public and private entities, including these *amici*, have filed suit challenging the decision to list these species. *Building Indust. Ass'n. v. Babbitt* (No. 1: 95 CV 00726) (PLF) (D.D.C.) (pending).

FWS brought the project to a halt, because Bonita Creek was designated part of the "critical" habitat of the Razorback Sucker, an endangered fish. *See* 56 Fed. Reg. 54,967 (Oct. 23, 1991). Other federal wildlife officials, however, found that no suckers occupied the Creek after the flood. Yet, FWS insisted that, to prevent "takes" of the fish and their unoccupied habitat, no repair equipment could enter the stream (for fear of crushing nonexistent suckers) and that additional operational restrictions be imposed. FWS's edict to protect absent fish delayed repairs to the Bonita Water System for six months. During this time emergency wells were in operation, at a great cost to the City. Estimated compliance costs exceeded \$1 million.

All of these examples bolster *Amici's* belief that, if the Ninth Circuit's interpretation is upheld, it will be virtually impossible for them to invoke the citizen suit provision of ESA Section 11(g)(1)(C), 16 U.S.C. §1540(g)(1)(C), to require the Secretary to perform non-discretionary procedural and substantive duties. It will also abrogate the important ESA policy of requiring Federal agencies to cooperatively resolve water resource issues "in concert" with wildlife preservation. 16 U.S.C. §1531(c)(2). If public agencies become powerless to challenge arbitrary decisions of the Secretary, countless hours and millions of tax dollars for vital public works could be needlessly sacrificed.

SUMMARY OF ARGUMENT

1. In making citizen suits available under the ESA to a broad class of "persons," and in authorizing suits to compel the Secretary's performance of nondiscretionary duties

(including the application of procedural safeguards to protect those regulated and affected by the ESA), Congress expressed its clear intent to *not* restrict standing only to "citizen monitors" seeking to promote species conservation.

2. The restrictions imposed by the Ninth Circuit on the right of irrigation districts to challenge defective governmental determinations that result in cutting off their access to vital water resources, are inconsistent with the ESA's express policy of requiring Federal agencies to cooperate with State and local agencies to resolve conflicts between water resource and species conservation issues.

3. Even if the court below correctly applied the "zone of interests" test to Petitioners, it should have found "procedural standing" here. Standing is proper under either the footnote seven test articulated by this Court in *Lujan* (i.e., based on their attempt to vindicate a threatened concrete interest by employing a procedural right conferred under the ESA), or under the D.C. Circuit's approach (*see, e.g., State of Idaho*) of considering both the Petitioners' "proprietary interest" in nearby land (furnishing the requisite concrete interest) and their status as "persons" with authority to sue under the ESA's citizen suit provision. Indeed, the Ninth Circuit has itself elsewhere recognized (in *Douglas County*) that nearby landowners "have 'concrete interests' that give them the right to insure that agencies follow correct procedures."

4. The only way to avoid hopelessly complex standing rules and the appearance of unfair and unequal access to the courts, is to assume that Congress meant what it said.

"Any person" with sufficiently concrete interests at stake may seek judicial redress under 16 U.S.C. §1540(g)(1)(C), to compel the Federal government to follow its mandatory ESA duties. Further, the Ninth Circuit's decision would give the Federal government a "blank check" to arbitrarily ignore the concerns of public agencies in the name of species conservation.

ARGUMENT

I. CONGRESS DID NOT INTEND TO PREVENT CITIZENS FROM CHALLENGING OVERLY ZEALOUS AND UNSCIENTIFIC IMPLEMENTATION OF THE ESA.

When this Court established the "zone of interest" test of prudential standing in *Ass'n of Data Processing Serv. Orgs. Inc. v. Camp*, 397 U.S. 150, 153-54 (1970), it made clear that Congress was free to "resolve [the] question [of standing] one way or another, save as the requirements of Article III dictate otherwise." *Accord Gladstone Realtors v. Bellwood*, 441 U.S. 91, 100 (1976). Congress has done precisely that in the ESA. It has established a broad "citizen suit" provision, which expressly confers the right to sue on "any person" who alleges a violation of the Act or its regulations, 16 U.S.C. §1540(g)(1)(A), or who seeks to compel performance of a nondiscretionary act or duty, 16 U.S.C. §1540(g)(1)(C).⁶

⁶ It is only the latter provision that is invoked in the present case. See, Complaint, Para. 3, App. 33 (appended to Petition for Writ of Certiorari).

Over the past quarter century, Congress has fashioned numerous "citizen suit" provisions, to promote compliance with the Nation's environmental laws. It has varied the scope of these provisions—sometimes being more narrow, sometimes more expansive. In none of these statutes has Congress ever expressed an intention that only groups serving an environmental agenda have standing to sue. This is illustrated by the tabulation of environmental citizen suit provisions in Appendix A. Indeed, if the Ninth Circuit's decision is upheld, then this Court will promote the position that *only* environmental preservationists have standing to sue under *all* of these statutes.

The vast majority of these provisions have in common a two-pronged thrust directed at (1) enjoining violations of the statute and its implementing regulations, and (2) ensuring that the implementing agency faithfully carries out its nondiscretionary (procedural and substantive) duties. If Congress had intended that only those "citizen monitors" with an interest in promoting species conservation and environmental protection could pursue civil actions under these statutes, it would have allowed citizen suits only to enjoin substantive violations, and not to rectify procedural and substantive deficiencies. It also would have allowed challenges only of violations claimed to impair effectuation of the statutes' environmental protection objectives.⁷

⁷ Significant also is the fact that, where Congress sought to restrict the scope of citizen suits, it knew how to do so. For example, one of the citizen suit provisions under TSCA is limited to review of missed deadlines under one section of the Act. See *infra*, Appendix A, at 1.

Congress chose to do neither. That silence speaks volumes and underscores the error of the Ninth Circuit's holding in *Bennett*.

II. **THE NINTH CIRCUIT'S OPINION LIMITS COURT REVIEW OF COMPLIANCE WITH THE ESA POLICY THAT FEDERAL AGENCIES "SHALL COOPERATE WITH STATE AND LOCAL AGENCIES TO RESOLVE WATER RESOURCE ISSUES IN CONCERT WITH CONSERVATION OF ENDANGERED SPECIES."**

The Ninth Circuit focuses on Section 2(b), 16 U.S.C. §1531(b), to support the proposition that only species conservation interests may be asserted in ESA citizen suits. This ignores the clear mandate of Section 2(c)(2) that Federal species protection duties be coordinated and reconciled with state and local water resource concerns.⁸ 16 U.S.C. §1531(c)(2). Indeed, by its use of mandatory language, Section 2(c)(2) creates a non-discretionary duty: "*Federal agencies shall cooperate with state and local agencies to resolve water resource issues in concert with conservation of endangered species.*" (Emphasis added.) In administering the ESA, all Federal agencies, including the FWS, must comply with this section. This procedural obligation to resolve competing species protection and water resource concerns is precisely the kind of duty intended to be enforced under Section 11(g)(1)(C) of the ESA's citizen suit provision.

⁸ Elsewhere, the ESA also directs that, "...the Secretary shall cooperate to the maximum extent practicable with the States." 16 U.S.C. §1535(a).

As noted, "any person" may compel the Secretary to carry out mandatory duties, such as the coordination responsibility found in ESA §2(c)(2). 16 U.S.C. §1540(g)(1)(c). The courts have recognized water agencies to be "persons" with standing to enforce these duties, where they allege the deprivation of water rights due to the failure to comply with the consultation requirements of ESA §2(c)(2). *Westlands Water Dist. v. United States Dep't. of Interior*, 850 F.Supp. 1388 (E.D. Cal. 1994). See also *United States v. Glenn-Colusa Irrigation Dist.*, 788 F.Supp. 1126 (E.D. Cal. 1992) ("The Act provides that federal agencies should cooperate with state and local authorities to resolve water resource issues regarding the conservation of endangered species...[;] enforcement of the Act does not affect...the manner in which the District exercises [its water] rights....").

It should be noted that the policy behind ESA §2(c)(2) parallels the mandate of Section 101(g) of the Clean Water Act (CWA), 33 U.S.C. §1251(g), which, using very similar language, explicitly directs federal agencies to cooperate with state and local agencies to "develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources." As this Court held in *PUD v. Washington Dep't of Ecology*, __U.S.__, 114 S. Ct. 1900 (1994), to assert that the CWA is concerned solely

with water *quality* and does not allow consideration of water *quantity* is an artificial distinction.⁹

Similarly, in this case, to assert that the ESA is solely concerned with species protection without considering state and local water resource needs perverts the Act's clear meaning. There is no ambiguity here—the Ninth Circuit's interpretation is in conflict with the express language of Section 2(c)(2), and precludes the ability of “persons,” including public water resource agencies, to vindicate the policy of resolving competing species protection and water resource concerns.

III. THE NINTH CIRCUIT'S RULING WOULD PRECLUDE *AMICI* FROM ASSERTING PROCEDURAL RIGHTS RECOGNIZED IN *LUJAN*, AND THWART *AMICI*'S PROPRIETARY RIGHT TO PROTECT AND MANAGE PUBLIC RESOURCES.

A. Footnote 7 of *Lujan v. Defenders of Wildlife* recognizes standing under the ESA to protect concrete procedural interests.

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572, n. 7, 8 (1992), this Court acknowledged that plaintiffs

⁹“It is the purpose of this [§ 101(g)] amendment to insure that State allocation systems are not subverted, and that effects on individual rights, if any, are prompted by legitimate and necessary water quality considerations.” 114 S.Ct. at 1913-14, referring to and quoting 3 Legislative History of the Clean Water Act of 1977 (Committee Print compiled for the Committee on Environment and Public Works by the Library of Congress), Ser. No. 95-14, p. 532 (1978).

living near a proposed federal dam would have “procedural standing” to sue if the licensing agency failed to prepare an Environmental Impact Statement (EIS), even though the EIS might not alter the plans for the dam. The Court indicated that there were two essential elements needed to establish such standing: (1) that the plaintiff is a “person who has been accorded a procedural right to protect [his or her] concrete interests...,” and (2) that the plaintiff has “some threatened concrete interest...that is the ultimate basis of [his or her] standing.”

In this case, the ESA citizen suit provision accords a right to any “person” to challenge FWS's failure to follow statutorily prescribed procedures, where discrete injury to such persons (distinct from that suffered by the public at large) has been alleged to flow from this failure. The petitioners have properly alleged a very real and imminently “threatened concrete interest: that their use of reservoir water for irrigation and other purposes “will be irreparably damaged by...the unlawful restrictions placed by defendants on the use of [the Clear Lake and Gerber reservoirs].” Complaint, Para. 6.

The Ninth Circuit, in construing the *Lujan* criteria for procedural standing, has erroneously enlarged these criteria by specifying that the “threatened concrete interest” must also fall within the “zone of interests” that the challenged statute is designed to protect. See, e.g., *Douglas County v. Babbitt*, 48 F.3d 1495, 1500-01 (9th Cir. 1995), citing *Pacific NW Generating Co-Op v. Brown*, 38 F.3d 1443, 1450 (1994), and *Friends of the Earth v. United States Navy*, 841 F.2d 927, 932 (9th Cir. 1988). However, in *Douglas County*, the same Court found that the County's “proprietary interest in its lands

adjacent to the critical habitat," supplied the "concrete, plausible interests, within NEPA's zone of concern for the environment, which underlie the County's asserted procedural interests." *Douglas County*, 48 F.3d, at 1501.¹⁰ In this case, as in *Douglas County*, Petitioners have a proprietary interest in access to reservoir water—which furnishes the requisite "concrete, plausible interest."

Thus, even under the Ninth Circuit's own interpretation of *Lujan* footnote seven, it is inexplicable how it can also view the interests of the current Petitioners—local irrigation districts and private ranchers whose primary supply of irrigation water is affected by the Respondents' Klamath project biological opinion—as meeting procedural standing requirements any less than the plaintiffs in *Douglas County*. There can be no question that the irrigation districts and ranchers have "some threatened concrete interest"—they face the curtailment of some or all of the irrigation water on which they vitally depend. It is equally clear that they are seeking to invoke "a procedural right" granted by the ESA to protect this concrete interest—specifically, the right to have FWS

¹⁰ Similarly, the Ninth Circuit found that plaintiffs with an economic interest in preserving salmon have a procedural interest in ensuring that the ESA is followed (*Pacific Northwest, supra*); that residents living near the site of a proposed port have procedural standing to sue over the Navy's alleged failure to following applicable permitting regulations (*Friends of the Earth, supra*); that the State of California has procedural standing to challenge the adequacy of an EIS on the Forest Service's land allocation (*State of California v. Block*, 690 F.2d 753, 776 (9th Cir. 1982)); and that a city near a proposed freeway interchange has procedural standing to challenge an agency's failure to prepare an EIS (*Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975)).

biological opinions and critical habitat designations based on "the best scientific and commercial data available," and only after considering relevant economic and other impacts. 16 U.S.C. §1533(b)(2). They also have the right to a legally sufficient statement of "reasonable and prudent measures," where a jeopardy determination is made that curtails their access to irrigation water. 16 U.S.C. §1536(b)(4)(C)(ii). In vindicating these procedural requirements, no environmental advocacy organization could possess a remotely comparable "concrete interest."

Here, the petitioners have a concrete interest in water. While the interest at stake in *Douglas County* was land, there is no difference between the interests being vindicated of the sort that would justify denying standing in one case and affirming it in the other.¹¹

B. At least one Court of Appeals has also recognized a State's standing to sue under the ESA to protect its proprietary interests as an owner and manager of lands under its jurisdiction.

The Ninth Circuit in *Bennett* cites a "division" between the D.C. Circuit and the Eighth Circuit over

¹¹ The mere fact that *Douglas County* asserted a NEPA violation is not a sufficient distinction. As the Ninth Circuit noted in its decision in *Bennett*, "[w]e see no reason why the ESA should be construed in a different manner from either NEPA or the Clean Water Act." 68 F.3d at 920. If anything, the "zone of interest" requirement should apply more fully to NEPA, which contains no express private right of action (and where review depends on APA §10), than to the ESA, which has its own citizen suit provision.

whether the zone of interests test applies to ESA suits "notwithstanding the citizen-suit provision...." 63 F.3d 915, 918, n. 3. However, even the D.C. Circuit has held that a State can acquire prudential standing to assert an ESA claim simply because of its "proprietary interest" in nearby land, coupled with its status as a "person" with authority to sue under the ESA's citizen suit provision.¹² *Idaho v. ICC*, 35 F.3d 585, 592 (D.C. Cir. 1994) (abandoned rail line approved by ICC passed over state-owned land).

Indeed, the Ninth Circuit itself, in *Douglas County*, recognized that footnote seven in *Lujan* considers property owners near a proposed dam to have standing to challenge an agency's failure to prepare an EIS based "on the fact that people living close to a proposed dam have 'concrete interests' that give them the right to insure that agencies follow correct procedures." 48 F.3d at 1507, n. 4. Yet, the *Bennett* decision essentially denies ESA standing to protect equally concrete proprietary interests of local governments that provide essential public services.

¹² Although the court found the State's management of the adjoining land for wildlife protection enhanced its "reliability" as a plaintiff in promoting the public interest, Judge Buckley writing, for a unanimous panel, held that the State's prudential standing was reinforced by the fact that the ESA's citizen suit provision specifically authorizes a State to bring an action...by defining "persons" authorized to bring actions to include "any State." *Id.*

IV. EVEN THE NINTH CIRCUIT, CONSISTENT WITH THE RULINGS OF THIS COURT, HAS ACKNOWLEDGED THAT THE "ZONE OF INTEREST" TEST IS NOT ONE OF "UNIVERSAL APPLICATION" IN CASES WHICH DO NOT REQUIRE REVIEW IN ACCORDANCE WITH THE ADMINISTRATIVE PROCEDURE ACT

The "zone of interest" test traces back to this Court's holding (per Justice Douglas) in *Data Processing*, that providers of data processing services had standing to challenge a ruling under the Bank Service Corporation Act and the National Bank Act, allowing national banks to make data processing services available to their customers and to other banks. 397 U.S. at 153. As the Court made clear, however, the statutes at issue in that case conferred no private right of action; rather, judicial review was provided under Section 10 of the Administrative Procedure Act (APA §10), 5 U.S.C. §702. By contrast: "[A] test... which rests on an explicit provision in a regulatory statute conferring standing and [which] is commonly referred to in terms of allowing suits by 'private attorneys general,' is inapplicable to the present case." *Id.*, 397 U.S. at 153, n. 1. Thus, the "zone of interest" test developed as an evaluation of whether the petitioners "are within that class of 'aggrieved' persons who, under §702 are entitled to judicial review of 'agency action' [under the relevant substantive statute at issue]." 397 U.S. at 157. However, where, as here, the statute itself confers a private right of action, one need look only to the scope of allowable citizen suits (and Article III) under the terms of that statute.

Later, in *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 395 (1987), this Court confirmed that the *Data Processing* Court had added the "zone of interest" test as a "gloss on the meaning of §702," because "[i]t was thought...that Congress, in enacting §702, had not intended to allow suit by every person suffering injury in fact."¹³ It also acknowledged that "[t]he principal cases in which the 'zone of interest' test has been applied are those involving claims under the APA..., noting that the Court might require more from a would-be plaintiff invoking an implied private right of action under a statute "in conditions that make the APA inapplicable." 479 U.S. at 400, n. 16. Clearly, the same logic dictates that a lesser test (or none at all) might be applied where Congress has specified the intended scope of private actions in an explicit and self-contained citizen suit provision.

The Ninth Circuit, in its decision below, acknowledged this Court's instruction in *Clarke* that the "zone of interest" test is *not* one of "universal application" in cases brought under statutes other than the APA.¹⁴ 63 F.3d 915, 917 (9th Cir. 1995). And, in *Douglas*

¹³ Moreover, to establish a right to relief under 5 U.S.C. §702, one must show (1) that he has been affected by some "agency action," as defined by 5 U.S.C. §551(13), and (2) he must prove that he is "adversely affected or aggrieved" by that action "within the meaning of the relevant statute,"—"which requires a showing that the injury complained of falls within the 'zone of interests' sought to be protected by the [underlying statutes]." *Lujan v. NWF*, 497 U.S. 871, 883 (1990).

¹⁴ However, the Ninth Circuit notes that, "[p]erhaps because the [*Clarke*] Court did not proceed to explain how the test might differ when applied to non-APA actions, our court, like most others, has continued to apply the traditional zone of interests test to such actions, as well as to APA cases." *Bennett, supra*, 63 F.3d at 917.

County, 48 F.3d at 1499, the Ninth Circuit held that "a plaintiff challenging a statutory provision under the *Administrative Procedure Act*...must show that the injury he or she has suffered falls within the 'zone of interests' that the statute was designed to protect" [emphasis added]—clearly implying that the "zone of interest" inquiry need not necessarily be made in a non-APA challenge.

Similarly, the D.C. Circuit has differentiated, in considering the applicability of prudential standing requirements, between statutes (such as the Resource Conservation and Recovery Act (RCRA)) providing for judicial review under the APA, and those (such as the Energy Policy and Conservation Act of 1975 and the ESA), which do not:

...Section 702 of the [APA] provides for judicial review at the behest of any person "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action," 5 U.S.C. §702, and the Supreme Court has repeatedly held, both before and after [the D.C. Circuit's earlier case under the Energy Policy Act], that prudential limitations apply to review of agency action under that section. [Citations omitted.]....

Hazardous Waste Treatment Council v. EPA, 885 F.2d 918, 921 (D.C. Cir. 1989). The D.C. Circuit, therefore, found prudential limitations "inescapably applicable" to the RCRA case before it, because RCRA provides for judicial review in accordance with the APA. *Id.*

Congress was very explicit and selective in specifying which citizen suit provisions were to give rise to judicial review in accordance with APA and which were not. As indicated in Appendix A, certain citizen suit provisions were made subject to APA standards of review. Others were not. Still others were made subject in part to the APA.

Therefore, it follows that cases arising under the ESA's citizen suit provision, *which do not provide for judicial review in accordance with the APA*, need not apply the "zone of interest" test (at least not to the same extent).¹⁵

V. FUNDAMENTAL FAIRNESS AND MAINTAINING COMPREHENSIBLE RULES OF COURT ACCESS DICTATE REVERSAL OF THE NINTH CIRCUIT'S DECISION.

- A. The "zone of interest" test as applied by the Ninth Circuit creates convoluted distinctions among classes of affected persons and should be discarded where, as here, citizen suit jurisdiction is sought to compel the performance of non-discretionary statutory duties.

Beyond the Circuit Court conflict that led this Court to grant *certiorari* in this case, judicial decisions on

¹⁵ Unlike RCRA, which specifies that "[a]ny judicial review of final regulations promulgated pursuant to this chapter... shall be in accordance with sections 701 through 706 of title 5...", 42 U.S.C. §6976(a), the counterpart ESA provision, 16 U.S.C. §1540(g)(1), simply confers jurisdiction on the district courts without any reference to the APA. It is not relevant that the complaint in this case alleged violations of the APA, as well as the ESA and NEPA, because the prudential standing issues before this Court are confined to those presented under Subparagraph (C) of the ESA's citizen suit provision.

the applicability of the "zone of interest" test to ESA cases have been confusing and inconsistent. This is illustrated by the table in Appendix B.

The Ninth Circuit's approach creates irrational and convoluted distinctions among interested and affected persons. For example, the *Bennett* panel cites *Pacific Northwest*, *supra*, in distinguishing between persons with environmental interests, who have standing, and those with economic interests, who do not. But, this merely underscores the confusing and inconsistent pattern of ESA (and other environmental) standing decisions by the Ninth Circuit and other courts. (See, e.g., table in Appendix B). As *Pacific Northwest* recognized, even those with economic interests may have standing ("a narrow or cynical understanding of economic interest is not decisive" [38 F.3d at 1065]), as long as the economic interest parallels the ESA's species preservation objectives. Thus, in the Ninth Circuit's view, hydropower users come within the Act's zone of interests when they sue to enforce stronger protections for listed salmon species, so that the water on which they depend for their economic livelihoods does not need to be diverted for the well-being of the salmon. *Id.* But, if the same hydropower users, with the same interest in getting more of the water shared with listed species, employed a different legal theory—i.e., that diversion of water to protect the species is scientifically unnecessary—then the Ninth Circuit would hold [as in *Bennett*] that they were not within the ESA's zone of interests.

In a similar vein, the Ninth Circuit would recognize the standing of a mink coat manufacturer to promote the preservation of mink (even though that interest is not only

economic but consumptive)—while, presumably denying the standing of a timber harvester, also seeking to protect his livelihood, where the harvesting of the timber might incidentally reduce the habitat of birds nesting or feeding therein. See, *Pacific Northwest*, 38 F.3d at 1065.

When a court-established rule, like the “zone of interest” test, requires ever-increasing court time to decipher and interpret because it is so difficult to apply—especially where Congress has established a broad right of citizen suit—it should be abandoned in favor of affording the full access to the courts intended by Congress.

- B. If the Ninth Circuit’s decision is affirmed, State and local governments and public resource agencies could be compelled to expend taxpayers’ money without any ability to challenge arbitrary impositions by the Federal government.**

Public resource agencies have a particularly strong claim to access to the courts under the ESA—because they represent a broader public interest and not merely private pecuniary interests; because they are expressly authorized to sue (under the expansive definition of “persons” in the ESA’s citizen suit provision); and because the ESA creates a partnership between the Federal government, in vindicating species conservation objectives and State and local governments with interests in the management of land and water resources.

The opinion below would effectively shield from judicial review, all efforts by public agencies to contest arbitrary decisions of the Secretary. Under the *Bennett*

holding, FWS could impose increased burdens on taxpayers to meet such ESA requirements as developing Habitat Conservation Plans and restrictions on the use of designated critical habitat, with no right of review. Indeed, public agencies would be unable to contest even the basic decision to list species, which triggers a myriad of obligations. Such challenges have recently led to decisions exposing serious flaws in FWS listing actions, such as failure to make important studies and data available for public review and comment.¹⁶ Surely, Congress could not have sanctioned denial of access to the courts in such cases, in the name of what one court has termed “a form of totalitarian virtue—a concept for which no precedent has been advanced and which is foreign to the rule of law.”¹⁷

CONCLUSION

For the foregoing reasons, the Ninth Circuit erred in concluding, in disregard of the ESA’s broad citizen suit provision, that only those “who allege an interest in the preservation of endangered species fall within the zone of interest[s] protected by the ESA” and have standing to sue to enforce its procedures. The Ninth Circuit’s position is especially untenable where it precludes access to the courts by adversely affected public resource agencies, which Congress intended play a partnership role with

¹⁶ See, e.g., *Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392 (9th Cir. 1995) (*Bruneau Hot Springs*); *Endangered Species Comm. of the Bldg. Indus. Ass’n v. Babbitt*, 852 F.Supp. 32 (D.D.C. 1994) (*Coastal California Gnatcatcher*).

¹⁷ *Mausolf v. Babbitt*, 913 F.Supp. 1334, 1342 (D.Minn. 1996).

FWS, in balancing the public interest in species conservation against that in the effective use and management of water resources. Accordingly, and because it goes beyond the bounds specified by this Court in *Clarke* and *Lujan*, the decision of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted.

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APPENDIX A

CITIZEN SUIT PROVISIONS IN ENVIRONMENTAL
STATUTES

Statute (Citation)	Scope of Standing to Sue
³ Endangered Species Act of 1973, 16 U.S.C. §1540(g)(1)	“...any person may commence a civil suit on his own behalf—(A) to enjoin any person...who is alleged to be in violation...; or (B) to compel the Secretary to apply...the prohibitions...with respect to the taking of any resident endangered species...; or (C) against the Secretary where there is alleged a failure...to perform any [nondiscretionary] act or duty....”
³ Energy Supply & Environmental Coordination Act of 1974, 15 U.S.C. §797(b)(5)	“Any person suffering legal wrong because of any act or practice arising out of any violation of subsection (a)...may bring a civil action”
² Toxic Substances Control Act [TSCA], 15 U.S.C. §2619(a)	“...any person may commence a civil action (1) against any person... alleged to be in violation..., or (2) against the Administrator to compel the Administrator to perform any [nondiscretionary] act or duty....”
² TSCA, 15 U.S.C. §2647(f)(1)	“Any person may commence a civil action ...to compel the Administrator to meet [§2643] deadlines....”

APPENDIX A (CONTINUED)

Statute (Citation)	Scope of Standing to Sue
^{2/} Surface Mining Control & Reclamation Act of 1977 , 30 U.S.C. §1270(a)	"...any person having an interest which is or may be adversely affected may commence a civil action...to compel compliance with this chapter...."
^{2/} Clean Water Act , 33 U.S.C. §1365(a)	"...any citizen may commence a civil action...(1) against any person...who is alleged to be in violation..., or (2) against the Administrator where there is alleged a failure...to perform any [nondiscretionary] act or duty...."
^{2/} Marine Protection, Research, and Sanctuaries Act , 33 U.S.C. §1415(g)(1)	"...any person may commence a civil suit...to enjoin any person...who is alleged to be in violation of any prohibition, limitation, criterion, or permit...."
^{2/} Noise Control Act of 1972 , 42 U.S.C. §4911(a)	"...any person (other than the United States) may commence a civil action...(1) against any person...who is alleged to be in violation..., or (2) against—(A) the Administrator... where there is alleged a failure to perform any [nondiscretionary] act or duty..., or (B) the Administrator of the [FAA]....under section 1431...."

APPENDIX A (CONTINUED)

Statute (Citation)	Scope of Standing to Sue
^{1/} Solid Waste Disposal Act (RCRA) , 42 U.S.C. §6972(a)	"...any person may commence a civil action...(1)(A) against any person... alleged to be in violation of any permit...; or (B) against any person...who has contributed to...imminent and substantial endangerment...; or (2) against the Administrator where there is alleged a failure...to perform any [nondiscretionary] act or duty...."
^{2/} Clean Air Act , 42 U.S.C. §7604(a)	"...any person may commence a civil action...(1) against any person... alleged to have violated...[an emissions standard or official order], (2) against the Administrator where there is...a failure...to perform any [nondiscretionary] act or duty..., or (3) against any person who proposes...any new or modified major emitting facility without a permit...."
^{2/} CERCLA (Superfund law) , 42 U.S.C. §9659(a)	"...any person may commence a civil action...(1) against any person...who is alleged to be in violation...; or (2) against the President... where there is alleged a failure...to perform any [nondiscretionary] act or duty...."

APPENDIX A (CONTINUED)

Statute (Citation)	Scope of Standing to Sue
^{3/} Emergency Planning and Community Right-to-Know Act of 1986, ¹ 42 U.S.C. §11046(a)(1)	"...any person may commence a civil action...against...: (A) An owner or operator...for failure to...(B) The Administrator for failure to...(C) [Various officials] for failure to provide a mechanism for public availability of information.... (D) Certain State officials] for failure to respond to a request for tier II information...."
^{3/} Act to Prevent Pollution from Ships, 33 U.S.C. §1910(a)	"any person may bring an action...(1) against any person...; (2) against the Secretary where there is alleged a failure...to perform any [nondiscretionary] act or duty; (3) against the Secretary of the Treasury when there is alleged a failure...to take action under section 1908(e)...."
^{2/} Public Health Service Act, 42 U.S.C. §300j-8(a)	"...any person may commence a civil action...(1) against any person..., or (2) against the Administrator where there is alleged a failure...to perform any [nondiscretionary] act or duty...."

Endnote:

NOTES REGARDING APPLICABILITY OF ADMINISTRATIVE PROCEDURE ACT JUDICIAL REVIEW PROVISIONS TO CITIZEN SUITS:

^{1/} Statute calls for judicial review in accordance with 5 U.S.C. §§701-706.

^{2/} Statute calls for judicial review of only specified provisions in accordance with 5 U.S.C. §§701-706.

^{3/} Statute does not call for judicial review of any provisions in accordance with 5 U.S.C. §§701-706.

APPENDIX B

DECISIONS FINDING EXPLICIT OR IMPLICIT
STANDING IN CASES UNDER VARIOUS ESA
PROVISIONS

Asserted Interest	Standing?	Rationale (Reference)
Section 4:		
County challenges procedural defects in critical habitat designation for Northern Spotted Owl, alleging a threat of disease, insects, and fire to adjoining County lands	Yes	"The County has a procedural right, as well as a concrete interest that could be harmed by the critical habitat designation, and that interest is within the zone of interests protected by NEPA." [Douglas County v. Babbitt, 48 F.3d 1495 (9 th Cir. 1995)]
Farm group challenges procedural defects in the listing of the Bruneau Hot Springsnail (based on harm to farmers' property interests)	Implicit	Standing was not discussed. [Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392 (9 th Cir. 1995)].

APPENDIX B (CONTINUED)

Asserted Interest	Standing?	Rationale (Reference)
Builders challenge listing of the Coastal California Gnat-catcher based on a dubious scientific study (based on harm to property interests)	Implicit	Standing was not discussed. [Endangered Species Comm. of the Bldg. Indus. Ass'n v. Babbitt, 852 F.Supp. 32 (D.D.C. 1994)]
City challenges the emergency listing of the Desert Tortoise as scientifically defective and arbitrary (based on harm to property interests)	Implicit	Standing was not discussed. [Las Vegas v. Lujan, 891 F.2d 927 (D.C. Cir. 1989)].
Farming interests challenge decision to list four species of Snake River mollusks (based on the threat to water rights and necessary farming and ranching practices)	No	"[W]here the only injury [is]...additional costs to business operations, and where such harm cannot be relieved by preserving the species, such a claim is not within the [ESA's] 'zone of interests'..." [Idaho Farm Bureau Fed'n v. Babbitt, 900 F.Supp. 1349, 1358 (D.Idaho 1995)].

APPENDIX B (CONTINUED)

Asserted Interest	Standing?	Rationale (Reference)
Section 7		
Hydropower users seek to avoid need for economically hurtful water diversions by seeking stronger protections of listed salmon	Yes	"a narrow or cynical understanding of economic interest is not decisive" even though salmon extinction would serve plaintiffs' economic interests as well as species restoration. [<i>Pacific Northwest, supra</i> , 38 F.3d 1058 (9 th Cir. 1994)].
Water users seek to avoid economically hurtful water impoundments by challenging their scientific basis	No	"Only plaintiffs who allege an interest in the preservation of endangered species fall within the zone of interests protected by the ESA" [<i>Bennett v. Plenert, supra</i>].

APPENDIX B (CONTINUED)

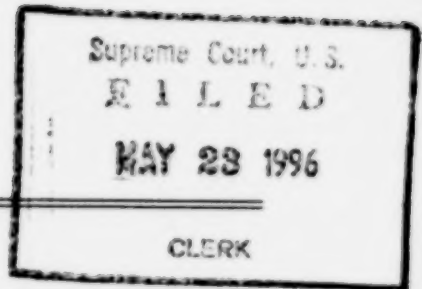
Asserted Interest	Standing?	Rationale (Reference)
Timber companies challenge as procedurally defective measures embodied in management plan to protect the Red-Cockaded Woodpecker (based on alleged economic, quality of life, and environmental injuries)	No	"[T]he injuries asserted...are generalized grievances which...are not peculiar to [the plaintiffs]...but rather are shared by all citizens." None of the alleged injuries "constitute injury to a separate concrete interest." [<i>Region 8 Forest Serv. Timber Purchasers v. Alcock</i> , 993 F.2d 800, 810 (11 th Cir. 1993)].
Snowmobilers challenge closure of Park trails (to protect wolves and eagles from disturbance) as preventing them from observing wolves in their natural habitat and lacking a proper basis under the ESA	Yes	"Although plaintiffs' immediate concern may not be protection of wolves or their habitat, the desire to observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for purposes of standing." [<i>Mausolf v. Babbitt</i> , 913 F.Supp. 1334 (D. Minn. 1996)].

APPENDIX B (CONTINUED)

Asserted Interest	Standing?	Rationale (Reference)
Section 9:		
Loggers and land-owners challenge the statutory validity of the DOI regulation defining "harm" to include habitat modification, because applying it to the Red-Cockaded Woodpecker and the Northern Spotted Owl harmed them economically	Implicit	<p>"[W]e must assume arguendo that [the respondents' continuation of otherwise lawful logging activities] will have the effect... of detrimentally changing the natural habitat of both listed species and that, as a consequence, members of those species will be killed or injured."</p> <p>[<i>Babbitt v. Sweet Home Chapter of Communities for a Great Or.</i>, ___ U.S. ___, 115 S.Ct. 2407, 132 L.Ed.2d 597 (1995)].</p>

13

No. 95-813



In The
Supreme Court of the United States
October Term, 1995

BRAD BENNETT, et al.,

Petitioners,

vs.

MARVIN PLENERT, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF
AMERICAN HOMEOWNERS FOUNDATION
AMERICAN LAND RIGHTS ALLIANCE
AS AMICI CURIAE*
IN SUPPORT OF PETITIONERS

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38 PP

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BRIEF *AMICI CURIAE* OF

**CENTER FOR THE DEFENSE OF FREE
ENTERPRISE,
CITIZENS FOR CONSTITUTIONAL PROPERTY
RIGHTS,
COALITION TO PROTECT AND PRESERVE
PRIVATE PROPERTY RIGHTS,
DAVIS MOUNTAINS TRANS-PECOS HERITAGE
ASSOCIATION,
FRONTIERS OF FREEDOM,
HILL COUNTRY HERITAGE ASSOCIATION,
INDEPENDENT FOREST PRODUCT
ASSOCIATION,
MAINE CONSERVATION RIGHTS INSTITUTE,
NATIONAL ASSOCIATION OF
MANUFACTURERS,
NATIONAL COALITION FOR PUBLIC LANDS
AND NATURAL RESOURCES
(PEOPLE FOR THE WEST!)
NATIONAL HARDWOOD LUMBER
ASSOCIATION,
NATIONAL WILDERNESS INSTITUTE
OREGONIANS IN ACTION LEGAL CENTER,
PENNSYLVANIA LANDOWNERS'
ASSOCIATION,
SOUTHEASTERN LUMBER MANUFACTURERS
ASSOCIATION,
TEXAS JUSTICE FOUNDATION,
TEXAS WILDLIFE ASSOCIATION,
TRANS TEXAS HERITAGE ASSOCIATION, and
DEFENDERS OF PROPERTY RIGHTS**

QUESTION PRESENTED FOR REVIEW

Whether a court may pick and choose among those provisions which it will allow to be enforced by way of a citizens suit provision?

TABLE OF CONTENTS

QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
IDENTITIES AND INTERESTS OF <i>AMICI CURIAE</i>	3
STATEMENT OF THE CASE	9
SUMMARY OF ARGUMENT	12
ARGUMENT	17
I. THE ROLE OF THE COURT IN ENFORCING CITIZEN'S SUITS PROVISIONS IS TO UPHOLD THE INTENT OF CONGRESS AS EVIDENCED BY THE LANGUAGE OF THE ACT	17
II. PROTECTING PRIVATE PROPERTY RIGHTS AND ECONOMIC INTERESTS FURTHERS THE INTENT OF CONGRESS TO PROTECT ENDANGERED SPECIES	22
A. THE ESA DESIGNED TO CONSERVE ENDANGERED SPECIES AND IS ALSO PROTECTIVE OF ECONOMIC INTERESTS AND PROPERTY RIGHTS	23
B. PROTECTING PROPERTY RIGHTS AND ECONOMIC INTERESTS IS AN INTEGRAL ASPECT OF ACHIEVING PROTECTION OF ENDANGERED SPECIES	26
CONCLUSION	30

TABLE OF AUTHORITIES

U.S. CONSTITUTION

U.S. CONST. art. I, § 7	17
-------------------------------	----

STATUTES

16 U.S.C. § 1533(b)(2)	10
16 U.S.C. § 1536 (b)(3)(A)	10
16 U.S.C. § 1539(a)(2)(A)(i-iv)	26
16 U.S.C. § 1540 (g)(1)	12, 18
FWPCA § 505 (a)(1), 33 § 1365 (a)(1)	15

CASES

<i>Ass'n of Data Processing Serv. Organiz., Inc. v. Camp</i> , 397 U.S. 150 (1979)	13
<i>Babbitt v. Sweet Home Chapter of Communities for a Great Or.</i> , 115 S. Ct. 2407 (1995)	19, 23
<i>Block v. Community Nutrition Institute</i> , 467 U.S. 340 (1984)	15
<i>Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.</i> , 474 U.S. 361 (1986)	20

<i>Catron County Bd. of Commr's v. United States</i> , No. 94-2280, 1996 U.S. App. LEXIS 1479 at * 5 (10th Cir. Feb. 2, 1996).....	16
<i>Clarke v. Securities Industry Ass'n.</i> , 479 U.S. 388 (1987)	13,16,30
<i>Cohens v. Virginia</i> , 19 U.S. (6 Wheat.) 264 (1821).....	12
<i>Dan Caputo Co. v. Russian River County Sanitation</i> , 749 F.2d 571 (9th Cir. 1984).....	14
<i>Garcia v. United States</i> , 469 U.S. 70 (1984).....	21
<i>Nevada Land Action Ass'n. v. U.S. Forest Service</i> , 8 F.3d 713 (9th Cir. 1993).....	16
<i>Tennessee Valley Authority v. Hill</i> , 437 U.S. 153 (1978).....	19,27
<i>United Food and Commercial Workers Union Local 751 v.</i> <i>Brown Group, Inc.</i> No. 95-340, 1996 U.S. LEXIS 2956, at *9 (U.S. May 13, 1996).....	19,21
<i>United Food and Commercial Workers Union, Inc.</i> , No. 95-340, 1996 U.S. LEXIS 2956 (U.S. May 13, 1996).....	14,18
<i>Warth v. Seldin</i> , 422 U.S. 490 (1975).....	13

MISCELLANEOUS

M. Lynne Corn, Congressional Research Serv., <i>Endangered Species Act Issues</i> 1 (1992).....	26
Hank Fisher et al., "Building Economic Incentives Into The Endangered Species Act," <i>Endangered Species</i> <i>Technical Bulletin</i> Vol. 19, No. 2, p. 4 (U.S. Fish and Wildlife Service 1994).....	26

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Ralph K.M. Haurwitz, <i>Travis County's Balcones</i> <i>Conservation Plan Takes Off</i> , <i>Austin American-</i> <i>Statesman</i> , May 4, 1996, at 2.....	23
House Task Force on Endangered Species (May 18, 1995).....	29
National Wilderness Institute, "Going Broke? <i>Costs of the Endangered Species Act as Revealed in</i> <i>Endangered Species Recovery Plans</i> ", 1994.....	28
PERC, <i>The Endangered Species Act: Making Innocent</i> <i>Species The Enemy</i> 12 (Jane S. Shaw ed., 1995)	27,29
U.S. Fish and Wildlife Service, <i>Federal and State</i> <i>Endangered Species Expenditures: Fiscal Year</i> <i>1990</i> (1991).....	28
U.S. Fish and Wildlife Service, <i>Federal and State</i> <i>Endangered Species Expenditures: Fiscal Years</i> <i>1991, 1990 and 1989</i> (1992)	27
U.S. Fish and Wildlife Service, <i>U.S. Department of the</i> <i>Interior Budget Justifications: Fiscal Year</i> <i>1993</i> (1993).....	28
U.S. General Accounting Office, <i>Endangered Species</i> <i>Act, Information on Species Protection on Nonfederal</i> <i>Lands</i> at 3 (Dec. 1994).....	24
119 Cong. Rec. 25,669 (1973).....	24
119 Cong. Rec. 31,062 (1973).....	25
1996 WL 222408 (D.O.I.).....	23

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For The Ninth Circuit

**BRIEF OF
AMERICAN HOMEOWNERS FOUNDATION,
AMERICAN LAND RIGHTS ALLIANCE,
CENTER FOR THE DEFENSE OF FREE
ENTERPRISE,
CITIZENS FOR THE DEFENSE OF FREE
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CITIZENS FOR CONSTITUTIONAL PROPERTY
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MANUFACTURERS,**

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 NATIONAL HARDWOOD LUMBER
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 ASSOCIATION,
 SOUTHEASTERN LUMBER MANUFACTURERS
 ASSOCIATION,
 TEXAS JUSTICE FOUNDATION,
 TEXAS WILDLIFE ASSOCIATION,
 TRANS TEXAS HERITAGE ASSOCIATION, and
 DEFENDERS OF PROPERTY RIGHTS,
 AS *AMICI CURIAE*
 IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.3 of the Rules of this Court, the *amici curiae* submit the brief in support of Petitioners. Consent to the filing of this brief has been granted by counsel for Respondents and counsel for Petitioners, and has been lodged with the Clerk of this Court.

IDENTITIES AND INTERESTS OF *AMICI CURIAE*

Defenders of Property Rights is the nation's only legal defense foundation devoted exclusively to protecting private property rights. Defenders was founded as a non-profit, public interest firm in 1991 in recognition that property rights are today under siege by excessive government regulations and actions which have the effect of rendering the Constitution worthless. Defenders mission is to protect vigorously those rights considered essential by the framers of the Constitution, and to promote a better understanding of the relationship between private property rights and individual rights and liberties.

American Homeowners Foundation (Arlington, VA) is an independent education and research organization serving the nation's sixty-five million homeowners and millions of future homeowners. AHF believes that home owners' constitutional rights are the primary concern when enacting regulations and therefore must be protected by elected and appointed officials and the judicial system.

American Land Rights Association (Battle Ground, WA) is a non-partisan grassroots coalition of farmers,

ranchers, private property owners, rights holders, loggers, miners, and outdoor recreation advocates in or near federally managed areas or who are affected by federal land use or environmental laws and regulations.

Center for the Defense of Free Enterprise (Bellevue, WA) is a non-profit foundation engaged in the study of issues, economic trends, and governmental regulations as they relate to the operation of the free market. CDFE is dedicated to defending the right of individual American citizens and businesses to participate in the free market without the unmerited hindrance of the government, and seeks to further promote free market principles within contemporary American society.

Citizens for Constitutional Property Rights, Inc. (Crestview, FL) is a statewide grassroots organization whose mission is to secure private property guarantees provided in the Bill of Rights. CCPR engages in public advocacy projects that foster an awareness of programs that violate the United States Constitution by eroding private property rights. CCPR played a major role in promoting the enactment of strong property rights protections at the state level in 1995.

Coalition to Protect and Preserve Private Property Rights (Bakersfield, CA) is a non profit corporation organized and existing under the laws of the State of California whose mission is to educate and assist private property owners in the protection and preservation of their right to own and use private property as afforded by the United States Constitution, The Bill of Rights, and as an American Ideal.

Davis Mountains Trans-Pecos Heritage Association (Alpine, TX) is an association of Texas citizens formed in response to the abridgment of private property rights in the Davis Mountains and Trans-Pecos areas. The Association supports private property rights protection through research, public education, and other activities. Its mission embraces conservation of natural resources in conjunction with respect for private property rights, which underlie all other individual liberties.

Frontiers of Freedom (Arlington, VA) is a grassroots membership organization founded by Senator Malcolm Wallop to promote the basic ideas of the Founding Fathers as articulated in the Constitution to ensure the maximum amount of individual and economic freedom for every American.

Hill Country Heritage Association (Lampasas, TX) was formed in response to the proposed dedication of twelve Texas counties as habitat for an endangered species. Members of HCHA embrace the concept and practice of the conservation of natural resources in conjunction with respect for individual property rights.

Independent Forest Products Association (Portland, OR) represents small independent forest products manufacturers in the western, inter-mountain, and upper midwestern states who are dependent on federal lands for a stable timber supply. Many of IFPA's members are family-owned businesses located in rural communities that rely on timber as the economic backbone of their long-term business outlooks.

Maine Conservation Rights Institute (Lubec, ME) is a research and educational institute serving the land-owning public of Maine. MECRI keeps landowners informed of government policy, including proposed and existing programs that undermine private property rights. MECRI encourages private conservation and wise use land policies. MECRI is also the sponsor of the annual Conservation Rights Congress, which addresses contemporary land rights issues.

National Association of Manufacturers (Washington, DC) is the nation's oldest and largest broad-based industrial trade association. Its nearly 14,000 member companies and subsidiaries, including 10,000 small manufacturers, employ approximately eighty-five percent of all manufacturing workers and produce over eighty percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with the NAM through its Associations Council and National Industrial Council. The NAM supports the rights of private property owners and believes that all federal statutes, rules, and regulations impacting private property must be applied in a fair and just manner according to mandated legislative authority.

National Coalition for Public Lands and Natural Resources (Pueblo, CO) -- popularly known as People for the West! -- is a non-profit, grassroots organization formed to create a coalition to promote multiple use on public lands, individual private property rights, and the responsible production of our nation's natural resources. Its over 20,000

members advocate policies that balance environmental protection with economic growth.

National Hardwood Lumber Association (Memphis, TN) is a non-profit trade association composed of over 1,300 member firms who produce, sell, and use hardwood lumber. For almost a century, NHLA has maintained an order, structure, and ethical framework for the hardwood marketplace, and promoted the responsible stewardship of hardwood forests. It also plays a prominent role in educating lawmakers and the public about good forest management and the importance of private property ownership.

National Wilderness Institute (Washington, DC) is a national public interest group dedicated to the wise management of natural resources, unique and specific wildlife habitat, and wetlands. NWI encourages environmentally sound, site- and situation-specific practices that harness the dynamic and creative forces of the private sector -- including protection of private property rights -- and that reduce the regulatory burden of the federal government. NWI has applied a significant amount of its resources to the study and analysis of the impact of the Endangered Species Act on private property.

Oregonians in Action Legal Center (Tigard, OR) is a nonpartisan, non-profit, public interest law center involved in litigation to protect the constitutional rights of landowners and counter excessive land use regulation. It is financed entirely through the voluntary contribution of time and money from individuals, families, businesses, and foundations on a

continuing basis. OIA-LC successfully represented the Petitioner in the United States Supreme Court case of *Dolan v. Tigard*.

Pennsylvania Landowners' Association (Waterford, PA) was formed to educate the citizens of the Commonwealth of Pennsylvania about the threat to their property and personal freedom posed by increasingly intrusive regulations on land use, to generate public debate on the issue, and develop and implement a strategy to restore reason and balance to environmental regulation.

Southeastern Lumber Manufacturers Association (Forest Park, GA) is a non-profit trade association representing more than 380 independent lumber manufacturers in fifteen southeastern states. Its purpose is to promote the interests of its membership of small sawmill and planning mill operators. The timber supply on which their mills depend comes from both public and private lands throughout the southeast, a region most notably affected by the National Forest Service regulations to maintain the habitat of the "endangered" red-cockaded woodpecker.

Texas Justice Foundation (San Antonio, TX) seeks, through litigation and education, to protect the fundamental rights essential in providing and maintaining a bulwark of freedom for the individual against excessive government intrusion into their homes, affairs, and businesses. TJF provides legal representation to protect individual rights, limit government to its appropriate role, and promote a better business climate for job growth in Texas.

Texas Wildlife Association (San Antonio, TX) was formed in 1985 to serve as an advocate for the benefit of wildlife and for the rights of wildlife managers, landowners, and hunters in educational, scientific, political, regulatory, legislative, and legal arenas. It is a non-profit organization whose membership controls (either through ownership or leasing or consulting obligations) millions of acres of wildlife habitat in Texas. Its members are dedicated to the maintenance, management, and enhancement of wildlife habitat on private land. Its mission is to insure that wildlife -- especially on private property -- remains an enduring part of Texas.

Trans Texas Heritage Association (Alpine, TX) is a statewide organization dedicated to the protection of landowner rights. Its members collectively own over fifteen million acres of land in Texas and other states. Members of TTHA believe that private property rights are the cornerstone of the freedoms and liberties protected by the Constitution, and that environmental regulations and zoning restrictions often unreasonably limit private property ownership and development.

STATEMENT OF THE CASE

In the early 1900's the Bureau of Reclamation (Bureau) built reservoirs in northeastern California and southern Oregon for the purpose of providing irrigation water to farmers and ranchers in southern Oregon. This water system, known as the Lamath Project, includes Clear Lake and Gerber reservoirs, which are located in the project's eastern portion.

Throughout the century the Bureau has stored and released water from Clear Lake and Berber reservoirs pursuant to procedures which have remained essentially the same for decades. These long-standing practices have resulted in a steady supply of water relied upon by farmers and ranchers for decades.

Among those who rely on this water supply are Petitioners, Brad Bennett and Mario Giordano, who ranch in southern Oregon. Their ranching operations depend directly on their ability to receive irrigation water from Clear Lake and Gerber reservoirs. Changes in water management of these reservoirs directly affects the irrigation districts and the economic interests and property rights (water rights) of the ranchers who have petitioned for review of the decision below.

Due to concerns about population declines of two endangered species of fish (the Lost River Sucker and the shortnose sucker) in the western portion of the Klamath Project, the Bureau consulted with the United States Fish and Wildlife Service (Service), in accordance with the Endangered Species Act ("ESA" or "Act"). The ESA provides that in determining critical habitat for an endangered species the economic impact of such a determination must be considered. (16 U.S.C. § 1533(b)(2)). Furthermore, if economic adverse impact is determined, then reasonable and prudent alternatives are to be suggested in order to preserve the endangered species. (16 U.S.C. § 1536 (b)(3)(A)).

The Service rendered a biological opinion stating that Clear Lake had relatively stable sucker populations because the habitat was different from that in the western portion of the Klamath Project. The biological opinion reached a similar conclusion regarding Gerber Reservoir. However, the Service concluded that long term operation of the Klamath Project was likely to threaten extinction of two species of fish. One of the Service's recommendations was that the Bureau maintain a minimum water level in both Clear Lake and the Gerber Reservoir in order to preserve the fish. The Bureau agreed with this recommendation and decided to implement it as a reasonable, prudent alternative.

Contrary to Section 4 of the ESA, the Service did not consider the economic impacts of its decision on the Petitioners and their water rights in rendering its biological opinion. Thus, the biological opinion prepared by the Service did not reflect the fact that maintaining the recommended minimum water level will jeopardize Petitioners' ranching operations as well as adversely affect the ability of the irrigation districts to provide a reliable supply of water to farmers and ranchers in their districts.

Faced with the extinction of their livelihoods and the loss of their property rights, Petitioners as well as the irrigation districts filed a "citizen's suit" in federal district court under Section 11 (g)(1) of the ESA. Petitioners' suit was dismissed by the district court. The U.S. Court of Appeals for the Ninth Circuit upheld that dismissal on the ground that Petitioners'

economic interests did not fall within the "zone of interests" protected by the ESA.

SUMMARY OF ARGUMENT

As Justice Marshall once stated, courts have "no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). The language of the ESA citizen's suit provision at issue in this case plainly purports to confer jurisdiction upon the Petitioners:

"[A]ny person" may sue "the United States or any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this Chapter or regulation issued under the authority thereof." 16 U.S.C. § 1540 (g)(1).

Nevertheless, the court below upheld dismissal of the Petitioners' challenge to a biological opinion which serves as the basis of critical habitat designation and which threatens to infringe Petitioners' constitutionally protected property rights (water rights), even though the Endangered Species Act itself plainly states that such interests are to be taken into account in designating critical habitat. Ignoring both the citizen's suit provision itself and the other provisions of the Act, the court below focused on the reason why the ESA was enacted -- clearly to protect endangered species. The court below then simply excised from enforcement any provision from the Act which the court believed did not further that purpose. Specifically, the court believed that economic interests and property rights (water rights) do not further the purposes of

endangered species protection, and it therefore excluded as enforceable those provisions in the Act.¹

The court below asserted that it was entitled to inquire into the motives of the plaintiffs seeking to enforce the Act because of an applicable prudential test of standing -- the zone of interest test. Namely, the court below concluded that the motives of the Petitioners were not to protect endangered species, because Petitioners were seeking to protect their economic interests, and the court believed those interests are unrelated to protection of endangered species.

The "zone of interest" test precludes standing to a person who rests his claim on the legal rights of others, "even when the plaintiff has alleged [personal] injury sufficient to meet the 'case or controversy' requirement." *See Warth v. Seldin*, 422 U.S. 490, 500 (1975). The zone of interest test is normally used as an interpretative aid in ascertaining who is within the regulatory circle of the statute, where Congress has not provided a statutory cause of action. *See, e.g., Ass'n of Data Processing Serv. Organiz., Inc. v. Camp*, 397 U.S. 150, 154 (1979); *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 400 (1987) (National Bank Act contained no citizen's suit

¹ The logical implication of the holding by the court below is that *no* persons has standing to a citizen's suit -- only plants and animals do. As the court below rightly observed, the Endangered Species Act is intended to protect species of plants and animals other than human beings -- a goal which benefits all persons equally. Nothing in the Act suggests that protection of the short-nosed sucker is intended to benefit one class of persons more than another. Thus all persons possess an equal right to enforce the functioning of the ESA according to the requirements of the statute and regulations -- or no one does. To date, this Court has never held that animals or plants possess legal rights enforceable against human beings or the government.

provision so court applied the "zone of interest" test to determine whether plaintiffs had standing to bring suit). However, contrary to the court below's application, the zone of interest test is not a means whereby the court can avoid engaging in the usual rules of statutory construction. *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, No. 95-340, 1996 U.S. LEXIS 2956, at * 9 (U.S. May 13, 1996).

Put another way, the question that should have been asked by the court below is not *why* the ESA was enacted, but *how* did Congress decide endangered species should be protected. That question is answered by looking to the statute itself. As the Act reveals, Congress chose one way of protecting endangered species; it enacted a complex regulatory scheme containing eleven different sections. For example, Congress defined "take" in Section 7. Other sections relate specifically to private property rights and economic interests at issue in this case. For example, Section 5 sets up a federal land and water rights acquisition program and Section 4 specifically states that economic interests are part of the critical habitat designation process.

The citizen's suit provision contained in the ESA gives the right to enforce the entire statute, not just those provisions which the court believes should be enforced. Not only does selective enforcement of the Act vitiate congressional intent that all eleven provisions of the ESA be enforced, but selective enforcement destroys the balancing of interests which takes place in the legislative process and which is reflected in the

entire statute. Put simply, the Act reflects Congress' understanding as to the best way to protect endangered species by ensuring that economic and constitutional rights likewise be protected within the context of achieving that goal. The court cannot unilaterally decide for itself how it believes endangered species should be protected. *See Block v. Community Nutrition Institute*, 467 U.S. 340, 352-53 n.4 (1984)(structure of Agricultural Marketing Agreement Act of 1937 implied that Congress did not intend to allow consumer challenges to Secretary's market orders). However, the court below chose to substitute its own belief as to how endangered species should be saved and simply refused to enforce those provisions which it believed would not lead to saving endangered species.

The court below also pointed to two other environmental statutes as a basis for concluding that persons with economic interests should not have standing to sue to enforce environmental statutes. However, neither of those two statutes have citizen's suits similar to the provision in the ESA. For example, the citizen's suit provision in the Clean Water Act (Federal Water Pollution Control Act)(CWA), states that "any person" shall have standing to sue "any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation . . ." FWPCA § 505 (a)(1), 33 § 1365 (a)(1). Given the more narrowly focused citizen's suit provision in the CWA, it is no surprise that the court concluded as it did in

Dan Caputo Co. v. Russian River County Sanitation, 749 F.2d 571 (9th Cir. 1984), that a plaintiff alleging that it was deprived of grant funds lacked standing under the CWA to sue. Likewise, NEPA has no citizen's suit provision at all; challenges brought pursuant to that Act must be brought under the Administrative Procedures Act. See *Nevada Land Action Ass'n. v. United States Forest Service*, 8 F.3d 713 (9th Cir. 1993). But see *Catron County Bd. of Commr's v. United States*, No. 94-2280, 1996 U.S. App. LEXIS 1479, at * 5 (10th Cir. Feb. 2, 1996).

Finally, the question of how Congress intended to protect endangered species is answered by looking at the statute. Here the court below again erred. Looking to the citizen's suit provision itself and to the various provisions of the Act which Congress intended to be enforced, the Petitioners in the instant action are well within the regulated community under the ESA.² The biological opinion, by limiting use of the waters of the Lake and Reservoir, regulates Petitioners directly since a draw-down of the waters would be a "take" in violation of Section 9 of the ESA. Further, contrary to the court below's assertion, the zone of interest test applies only where the plaintiff himself is not regulated. *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 399 (1987).

In short, just as the court below would have erred had it enlarged its jurisdiction to grant standing to a plaintiff outside

² The court below erroneously stated that "[n]one of the plaintiffs is directly subject to the regulatory action. Rather, it is the Bureau of Reclamation which would be required to act if any rules regarding reservoir water levels are ultimately adopted." Pet. App. at 6 n.2.

the scope of the ESA, the court below erred by collapsing its jurisdiction to suit its own preferences. Congress drafted the ESA and the court's role is simply to enforce the Act as written. U.S. Const. art. I, § 7. Because the court below failed to do this, and in so doing has concocted a rule of standing which vitiates the balancing of interests contained in the Act designed to foster protection of endangered species, the decision below should be reversed.

ARGUMENT

I. THE ROLE OF THE COURT IN ENFORCING CITIZEN'S SUITS PROVISIONS IS TO UPHOLD THE INTENT OF CONGRESS AS EVIDENCED BY THE LANGUAGE OF THE ACT.

The citizen's suit provision contained in the ESA and at issue in this case is one of the broadest standing provisions imaginable. Indeed, it is hard to envision an aggrieved individual who, having satisfied Article III standing requirements,³ would not be entitled to sue under the ESA citizen's suit provision:

³ Clearly Congress cannot confer standing to sue beyond the constitutional requirements of "case or controversy." But the court below takes this obvious point and erroneously concludes that Congress cannot confer standing co-terminus with Article III standing, as it seems to have done with the ESA citizens suit provision: "We note that, whether or not the zone of interests test applies, the class of plaintiffs that Congress had in mind was necessarily more limited than the literal language of the citizen suit provision suggests. As *Lujan* makes clear, Congress may not permit suits by those who fail to satisfy the constitutionally mandated standing requirements. For that reason, suits under the ESA, no less than suits under any statute, are clearly not available to 'any person' in the broadest possible sense of that term." Pet. App. at 8-9 n. 4.

Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf --

(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof.

(16 U.S.C. § 1540(g)(1)).

This Court has recently held that courts are to construe strictly such language, rather than speculate as to whom Congress intended have standing to enforce the statute: "Speculation loses, for the more natural reading of the statute's text, which would give effect to all of its provisions, always prevails over a mere suggestion to disregard or ignore duly enacted law as legislative oversight." *United Food and Commercial Workers Union, Inc.*, No. 95-340, 1996 U.S. LEXIS 2956 (U.S. May 13, 1996).

Nevertheless, the court below engaged in analysis expressly rejected by this Court and refused to implement the plain language of the ESA holding instead that "the fact that a statute contains a citizen-suit provision does not necessarily establish that Congress intended that any particular plaintiff have standing to assert a violation." Pet. App at 11. According to the court below, courts are free to ignore the plain language of a citizen's suit provision if the court believes that the language chosen by Congress interferes with the court's view as to the "real" purpose of the statute in question:

In light of our consistent use of the zone of interests test in determining the standing of

plaintiffs who have sued under citizen-suit provisions, we hold that the ESA does not automatically confer standing on every plaintiff whose satisfies constitutional requirements and claims a violation of the Act's procedures. A contrary ruling would permit plaintiffs to sue even though their purposes were plainly inconsistent with, or only 'marginally related' to, those of the Act.

Id.

Employing the "zone of interest" test, a judicially imposed limitation on standing that is "malleable" by Congress, the court below ignored the text of the ESA and instead turned to court decisions, specifically *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) and *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 115 S. Ct. 2407 (1995), for discerning the intent of Congress in passing the ESA. However, even when analyzing this prudential standing question, this Court has held that the starting point for determining whether a plaintiff's claim is within a statute's zone of interest can only be determined by looking at the statute itself. *United Food and Commercial Workers Union, Inc. v. Brown Group, Inc.*, No. 95-340, 1996 U.S. LEXIS 2956 (U.S. May 13, 1996).

By failing to follow the rules of statutory construction the court took the overall goal of the ESA -- which is obviously to protect endangered species -- and simply refused to enforce those provisions of the Act which the court believed were inconsistent with that purpose. Indeed, rather than focusing on the means chosen by Congress to protect endangered species, the court below tried to explain away the plain

language of the Act, to the point of absurdity: "Certainly, [Congress] did not intend impliedly to confer standing on every plaintiff who could conceivably claim that the failure to consider one of those factors adversely affected him." Pet. App. at 17.

However, the role of the court is not to come up with its own means of accomplishing a statute's objective; rather, its role is to effectuate the means chosen by Congress. Contrary to the view expressed by the court below, under our constitutional scheme, the function of courts when dealing with the meaning of a statute is limited to ascertaining and effectuating the meaning of the statute. Only when the language of the statute is vague or ambiguous on its face is it appropriate for the court to inquire into legislative history. As Justice Frankfurter once cogently observed, statutory interpretation is not "an opportunity for a judge to use words as 'empty vessels into which he can pour anything he will' -- his caprices, fixed notions, even statesmanlike beliefs in a particular policy." Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 529 (1947).

Thus, the only acceptable evidence of the meaning of a statute is the text of the statute itself, read in the context of the entire statute, including any legislative purpose articulated in that statute, and legislative history. *Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 372 (1986)("[t]he 'plain purpose' of the legislation . . . is determined in the first instance with reference to the plain language of the statute itself."). As the *Board of Governors*

Court went on to explain, failure of the court to interpret the statute as written vitiates the compromises and balancing of interests that goes into crafting every complex statutory scheme: "Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent." *Id. See also Garcia v. United States*, 469 U.S. 70, 78 (1984)(This Court stated that it was "not willing to narrow the plain meaning of even a criminal statute on the basis of a gestalt judgment as to what Congress probably intended.").

The court below completely failed to give effect to the plain language of the citizen's suit provision contained in the ESA and instead substituted its own narrow "gestalt judgment" as to how it believed endangered species should be protected. In so doing, the court below has destroyed Congress' clear intent to accomplish conservation of endangered species through a statutory program which also protects the economic interests and constitutional property rights of individuals -- such as the Petitioners in this action.

As this Court just held on May 13, 1996, in a case involving the right of plaintiffs to sue to enforce the Worker Adjustment and Retraining Notification Act: "As we noted in *Warth*, prudential limitations are rules of 'judicial self-governance' that Congress may remove . . . by statute.' . . . It has done so without doubt in this instance." *United Food and Commercial Workers Union, Inc. v. Brown Group, Inc.*, No.

95-340, 1996 U.S. LEXIS 2956, at *23 (U.S. May 13, 1996).

Likewise, in the instance case, Congress has without doubt removed the prudential limitations to Petitioners' right to sue to enforce the ESA.

II. PROTECTING PRIVATE PROPERTY RIGHTS AND ECONOMIC INTERESTS FURTHERS THE INTENT OF CONGRESS TO PROTECT ENDANGERED SPECIES.

In 1973 Congress enacted the ESA, which was this nation's first attempt to achieve by law protection of endangered and threatened species of floral and fauna. The Act made clear, however, success depended upon all sectors of our society -- both public and private -- being involved in achieving that purpose. Hence, there are various provisions in the Act which address issues of private concern; notably, economic interests and private property rights.

Through the decades of enforcement, the Act's balanced approach to achieving protection of endangered species has been underscored. Recently Secretary of the Interior Bruce Babbitt discussed the importance balancing of interests reflected in the ESA in achieving its goals as reflected in the Act's habitat conservation plan program:

"The Balcones Canyonlands Conservation Plan is part of the Administration's focus on using the flexibility of the Endangered Species Act to find cooperative solutions that protect species. More than 140 habitat conservation plans that balance development with species protection under the

Endangered Species Act are now in place." 1996 WL 222408 (D.O.I.)⁴

The decision below destroys that balance reflected in the Act by closing the door to its full enforcement as envisioned by Congress.⁵

A. THE ESA IS DESIGNED TO CONSERVE ENDANGERED SPECIES AND IS ALSO PROTECTIVE OF ECONOMIC INTERESTS AND PROPERTY RIGHTS.

⁴ Habitat conservation plans created pursuant to the Act are an important way that balancing of interests are achieved under the Act. For example, with respect to the recently approved Balcones Habitat Conservation Plan commentators have observed: "[T]he plan enjoys broad support among environmental and business groups and represents a surprising consensus on an important issue in a city that thrives on debate." Ralph K.M. Haurwitz, *Travis County's Balcones Conservation Plan Takes Off*, Austin American-Statesman, May 4, 1996, at 2.

⁵ Likewise, as has been pointed out by EPA in its comments regarding an amendment to Requirements for Authorized State Permit Programs under Section 402 of the Clean Water Act, citizens suits provisions are an important part of citizens' participation in a government permitting program. When citizens are barred from challenged state-issued permits because of restrictive standing requirements in state law, the public's ability to participate effectively in the permitting process is significantly "chilled." "As EPA noted when it proposed today's rule on March 17, 1995 (60 FR 1488), when citizens are denied the opportunity to challenge executive agency decisions in court, their ability to influence permitting decisions through other required elements of public participation, such as public comments and public hearings on proposed permits, may be seriously compromised. If citizens perceive that a State administrative agency is not addressing their concerns about 402 permits because the citizens have no recourse to an impartial judiciary, that perception has a chilling effect on all remaining forms of public participation in the permitting process. *Without the possibility of judicial review by citizens, public participation before a State administrative agency could become a paper exercise.*" Amendment to Requirements for Authorized State Permit Programs Under Section 402 of The Clean Water Act, 40 C.F.R. Part 123 (1996) (emphasis supplied)

The purpose of the ESA, as demonstrated through its text and its legislative history, is to set out a program whereby endangered and threatened species are conserved. Congress adopted a system which is to accomplish this purpose through (1) federal land acquisition of private property; (2) outright avoidance of adverse impacts on endangered species by the federal government; and, (3) prohibitions on the "taking" of endangered species by any person or entity.

Through its land acquisition program, the ESA reflects Congress' intent to avoid foisting off on individuals the whole burden of achieving the objectives of the Act, by requiring the federal government to condemn private property necessary to protect a species. Explaining the purposes of the land acquisition program, floor manager for the ESA, Senator Tunney, stated: "Through these land acquisition provisions, we will be able to conserve habitats necessary to protect fish and wildlife from further destruction." 119 Cong. Rec. 25,669 (1973). Representative Sullivan, the floor manager for H.R. 37 -- the House version of the bill -- confirmed this approach:

For the most part, the principal threat to animals stems from the destruction of their habitat. . . . Whether it is intentional or not, however, the result is unfortunate for the species of animals that depend on that habitat, most of whom are already living on the edge of survival. H.R. 37 will meet this problem by providing funds for acquisition of critical habitat through the use of the land and water conservation fund. It will also enable the Department of Agriculture to cooperate with willing landowners who desire to assist in the protection of endangered species, but

who are understandably unwilling to do so at excessive cost to themselves.

119 Cong. Rec. 31,062 (1973).

See also *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 115 S. Ct. 2407, 2415 (1995), in which this Court discusses the purposes of the Section 5 land acquisition procedure is to allow the government to protect habitat before activity harms an endangered or threatened animal.

Other sections of the Act likewise reflect an attempt by Congress to protect private property rights. The consultation process under Section 7 can affect private landowners if a project or activity on private land requires some form of federal approval, such as a permit, or involves the expenditure of federal funds.

The habitat conservation planning process under section 10 provides a mechanism to address situations in which nonfederal projects or activities not requiring federal authorization or funding are in potential conflict with the protection of listed species; that is, such projects or activities may result in a prohibited taking of a listed animal or plant. Through this process, private landowners with activities or projects that may harm listed species can obtain a permit that allows the incidental taking of a listed species. *Id.*

To obtain an "incidental take" permit, the private landowner must develop a habitat conservation plan (HCP) -- a formal plan that specifies the effects that landowners' activities are likely to have on listed species, the measures that will be taken to minimize and mitigate these effects, the alternatives that the applicant considered and reasons why such

alternatives were not implemented, and any other measures the Service may require. (16 U.S.C. § 1539(a)(2)(A)(i-iv)).

B. PROTECTING PROPERTY RIGHTS AND ECONOMIC INTERESTS IS AN INTEGRAL ASPECT OF ACHIEVING PROTECTION OF ENDANGERED SPECIES.

As noted above, in 1973 Congress passed the Endangered Species Act which is today widely regarded as one of the most important and powerful environmental laws in the country. See generally M. Lynne Corn, Congressional Research Serv., *Endangered Species Act Issues* 1 (1992). Although a major component of the ESA is achieved by prohibitions placed on the federal government on public land ESA § 7, another large component of the ESA places prohibitions on certain actions by private individuals on privately owned land ESA § 9.

In fact, since one-half of the endangered species in this county live on privately owned land (and the habitat for endangered species is almost exclusively on private land), the ESA contains specific provisions discussed above that balance those private land and economic interests with the need to protect endangered species. See Hank Fisher et al., "Building Economic Incentives Into The Endangered Species Act," *Endangered Species Technical Bulletin* Vol. 19, No. 2, p. 4 (U.S. Fish and Wildlife Service 1994)

Contrary to the conclusion of the court below, as the Act itself reflects, Congress perceived protecting these private interests as being directly and critically related to the purpose of protecting endangered species. Indeed, no conservation

policy can succeed without the support of the regulated community.

Thus, as the Act clearly reflects, the likelihood of protecting endangered species is significantly increased when property rights and economic interests are respected. Moreover, examples of successful partnerships are well documented. See Generally PERC, *The Endangered Species Act: Making Innocent Species The Enemy* 12 (Jane S. Shaw ed., 1995).

And, despite the fact that this Court held shortly after the Act was passed that protection of endangered species were to be protected "whatever the cost" (*Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1978)), in practice endangered species recovery has proven to be very costly. Indeed, one of the most widely discussed impacts of the ESA is its cost. While no definitive study on the total economic impact of the ESA has been performed, U.S. Fish and Wildlife Service data reflect direct cost estimates⁶ for only 306

⁶ According to the U.S. Fish and Wildlife Service, even these estimates do not reflect all costs:

"A good faith effort was made to develop species by species expenditures for this report. However, the information presented again this year does not reflect the total governmental (federal and state) effort toward threatened and endangered species conservation and presents an incomplete funding picture . . . A significant portion of . . . conservation activities at all levels include law enforcement, consultation, recovery coordination, and other actions that are not easily or reasonably funded by species. . . . Accounting procedures for staff salaries and operational, maintenance and other support services are not normally creditable towards individual species totals. Also, there exists significant variability among the various federal and state agency reports." "Federal and State Endangered

recovery plans of over \$4 million (expressed in 1994 dollars). National Wilderness Institute, *Going Broke? Costs Of The Endangered Species Act As Revealed In Endangered Species Recovery Plans* (1994).

Looking at other government data pertaining to all species, the cost estimates are staggering. In 1990, the U.S. Department of Interior Inspector General estimated the potential future recovery costs for all endangered species to be over \$4.6 billion. This figure was based on a conservative estimate by the Service based on a ten-year recovery plan. U.S. Fish and Wildlife Service, *Federal and State Endangered Species Expenditures: Fiscal Year 1990* (1991).

Recovery, of course, is only one aspect of endangered species protection. According to the Service, in 1992, for every one dollar spent by the Service on actual species recovery, \$2.26 were spent by the same agency on related activities including permitting, consultation, enforcement and listing. U.S. Fish and Wildlife Service, *U.S. Department of the Interior Budget Justifications: Fiscal Year 1993* (1993). Other federal agencies, too, must spend money to comply with the Act. For example, in 1992 the U.S. Army Corps of Engineers spent \$5.2 million to protect the California least tern. The Department of the Navy spent \$.5 million that year on that same species.

Species Expenditures for Fiscal Years 1991, 1990 and 1989, U.S. Fish and Wildlife Service" (1992).

Indeed, in 1992, other federal and state agencies spent 5.4 times more on ESA compliance than the Service and the National Marine Fisheries Service, the two agencies primarily charged with implementing the Act.

Further, these figures do not include indirect costs borne by the private sector. Indeed, the court below's decision of particularly unfortunate given that one of the chief criticisms of the ESA is that the Act does has not been implemented in a way that adequately protects private property rights and economic interests. Assistant Secretary of Interior, Fish, Wildlife, and Parks, George T. Frampton, Jr., has testified that future enforcement "must reduce administration, economic, and regulatory burden on small landowners while providing greater incentives to conserve species." House Task Force on Endangered Species. (May 18, 1995).

Likewise, Environmental Defense Fund attorney, Michael Bean, recently told a group of U.S. Fish and Wildlife officials that "some private landowners are actively managing their land so as to avoid potential endangered species problems." PERC, *The Endangered Species Act: Making Innocent Species The Enemy* 8-9 (Jane S. Shaw ed., 1995). He emphasized that these actions are "not the result of malice toward the environment" but are "fairly rational decisions, motivated by a desire to avoid potentially significant economic constraints." *Id.* Bean further described the actions as being a "predictable response to the familiar perverse incentives that sometimes accompany regulatory programs, not just the endangered species program but others." *Id.*

Thus, while the Act as currently drafted reflects a need to protect economic interests and property rights, many believe that even greater protections should be contained in the Act. But, of course, the way to strike a different balance is through new legislation; not by judicial fiat.

CONCLUSION

The zone of interest test used to bar these Petitioners from enforcing certain provisions of the ESA has been held by this Court to be a prudential standard which bars only those plaintiffs whose interests "are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot be reasonably be assumed that Congress intended to permit the suit." *Clarke v. Securities Industry Ass'n.*, 479 U.S. 388, 399-400 (1987)(footnote omitted).

Here the interests of Petitioners are central the purpose of the ESA and the citizen's suit provision gives them explicit standing to bring suit to protect those interests. Hence, the *amici curiae* strongly urge this Court to reverse the decision below.

Respectfully submitted,

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Dated: May 24, 1996

14
No. 95-813

Supreme Court; U.S.

F I L E D

MAY 23 1996

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

BRAD BENNETT, ET AL., *Petitioner*,

v.

MARVIN PLENERT, ET AL., *Respondents*.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

**AMICUS CURIAE BRIEF OF THE STATES OF
CALIFORNIA, ALASKA, ARIZONA, ARKANSAS,
COLORADO, HAWAII, IDAHO, KANSAS, MISSOURI,
MONTANA, NEBRASKA, OHIO, UTAH AND WEST
VIRGINIA ON THE MERITS IN SUPPORT OF
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QUESTIONS PRESENTED

Under the "citizen suit" provision of the Endangered Species Act of 1973 ("ESA"), section 11(g)(1), 16 U.S.C. § 1540(g)(1), "any person" may commence a civil suit on his own behalf to enjoin the United States from violating the ESA or regulations issued thereunder. The questions presented are:

1. Whether the broad standing mandated by Congress in the citizen suit provision of the ESA is subject to a "zone of interests" test as a further, judicially imposed, prudential limitation on standing.

2. If standing to sue under the ESA is subject to prudential limitations, whether standing is limited exclusively to litigants asserting an interest in preserving endangered species, as the Ninth Circuit held, and does not include litigants whose economic interests have been adversely affected by the Government's violations of the ESA.

TABLE OF CONTENTS

	<u>Page</u>
INTEREST OF AMICI STATES	1
STATEMENT OF THE CASE	1
A. Nature of the Controversy	1
B. Proceedings Below	3
SUMMARY OF ARGUMENT	4
ARGUMENT	9
I. PETITIONERS HAVE STANDING UNDER SECTION 10 OF THE ADMINISTRATIVE PROCEDURE ACT.	9
A. Constitutional Standing	9
B. Prudential Standing	11
C. Legislative History	18
II. PETITIONERS HAVE STANDING UNDER THE CITIZEN SUIT PROVISION OF THE ENDANGERED SPECIES ACT	23
CONCLUSION	

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<i>Arnold Tours, Inc. v. Camp</i> 401 U.S. 45 (1970)	5, 12, 13
<i>Association of Data Processing Service Organizations, v. Camp</i> 397 U.S. 150 (1970)	5, 6
<i>Barlow v. Collins</i> 397 U.S. 159 (1970)	18
<i>Block v. Community Nutrition Institute</i> 467 U.S. 340 (1984)	17
<i>Clarke v. Securities Industries Association</i> 479 U.S. 388 (1987)	5, 6, 11, 12, 13, 23
<i>Columbia Broadcasting System, Inc. v. United States</i> 316 U.S. 407 (1942)	15
<i>Cort v. Ash</i> 422 U.S. 66 (1975)	11
<i>Cotovsky-Kaplan Physical Therapy Assn., Ltd. v. United States</i> 507 F.2d 1363 (7th Cir. 1975)	15
<i>Dan Caputo Co. v. Russian River County Sanitation, et al.</i> 749 F.2d 571 (9th Cir. 1984)	29
<i>Data Processing Service Organizations, Inc. v. Camp</i> 397 U.S. 150 (1970)	11, 12, 13

TABLE OF AUTHORITIES, CONT'D

<i>Federal Communications Commission v. Sanders Bros. Radio Station</i> 309 U.S. 470 (1940)	14
<i>Gladstone, Realtors v. Village of Bellwood</i> 441 U.S. 91 (1979)	11, 12, 23, 24
<i>Gollust v. Mendell</i> 501 U.S. 115 (1991)	23, 24
<i>Gonzales v. Gorsuch</i> 688 F.2d 1263 (9th Cir. 1982)	29
<i>Ickes v. Fox</i> 300 U.S. 82 (1937)	6, 16
<i>Investment Company Institute v. Camp</i> 401 U.S. 617 (1971)	5, 12, 13
<i>Joint Anti-Fascist Committee Refugee Committee v. McGrath</i> 341 U.S. 123 (1951)	17
<i>Lujan v. Defenders of Wildlife</i> 504 U.S. 555 (1992)	9, 11
<i>Nevada v. United States</i> 463 U.S. 110 (1983)	6, 16, 17
<i>Shaughnessy v. Pedreiro</i> 349 U.S. 48 (1955)	27
<i>Sierra Club v. Morton</i> 405 U.S. 727 (1972)	9, 25, 28

TABLE OF AUTHORITIES, CONT'D

<i>Simon v. Eastern Ky. Welfare Rights Organization</i> 426 U.S. 26 (1976)	9
<i>State of Nebraska v. State of Wyoming</i> 325 U.S. 589 (1945)	6, 16
<i>Trafficante v. Metropolitan Life Insurance Co.</i> 409 U.S. 205 (1972)	24
<i>TVA v. Hill</i> 437 U.S. 153 (1978)	19
<i>United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.</i> ___ U.S. ___, 1996 USLW 241649 (May 13, 1996)	23
<i>United States v. Ron Pair Enterprises, Inc.</i> 489 U.S. 235 (1989)	24
<i>United States v. Storer Broadcasting Co.</i> 351 U.S. 192 (1956)	15
<i>Valley Forge Christian College v. Americans United</i> 454 U.S. 464 (1982)	9, 11
<i>Warth v. Seldin</i> 422 U.S. 490 (1975)	23
<i>Yakus v. United States</i> 321 U.S. 414 (1944)	18
<u>Constitutional Provisions</u>	
Article III, U.S. Constitution	7, 9, 23, 24, 29

TABLE OF AUTHORITIES, CONT'D**Federal Regulations**

50 Code of Federal Regulations	
§ 402.14	10
§ 402.14(i)(5)	3, 10
53 Fed.Reg. 27130-27134 (1988)	2
59 Fed.Reg. (1994)	
pp. 61744-61758	2
p. 61744	4
p. 61745	4
p. 61750	4
pp. 61754-61755	4
pp. 61756-61758	4

Federal Statutes

Administrative Procedure Act	
§ 10	4, 8, 9, 23, 27, 29
§ 12	8, 27
Bank Service Corporation Act	
§ 4	13
Endangered Species Act	
§ 2(c)(2)	22
§ 3(13)	1
§ 4	1, 3, 22
§ 4(b)(2)	3, 6, 16, 18, 19
§ 7	1, 2, 3, 6, 16, 18, 20, 22
§ 7(a)	21
§ 7(a)(2)	3, 10, 21
§ 7(c)	21

TABLE OF AUTHORITIES, CONT'D**Endangered Species Act Cont'd**

§ 11(g)(1)	1
§ 11(g)(1)(A)	24
§ 11(g)(1)(B)	24
§ 11(g)(1)(C)	24
5 United States Code	
§ 559	8
§ 702	4, 9
16 United States Code	
§ 1531(c)(2)	22
§ 1532(13)	1, 10
§ 1533	1
§ 1533(b)(2)	3, 6, 16, 18
§ 1536(b)(3)(A)	10
§ 1536	1, 2, 6, 16
§ 1536(a)(2)	10
§ 1536(c)(2)	10
§ 1536(e)-(p)	19
§ 1536(o)(2)	3
§ 1540(a)	10
§ 1540(b)	10
§ 1540(g)	10
§ 1540(g)(1)	1, 23
§ 1540(g)(1)(A)	24
§ 1540(g)(1)(B)	24
§ 1540(g)(1)(C)	24
§ 1540(g)(5)	8
30 United States Code	
§ 1270	25
43 United States Code	
§ 371 et seq.	1

TABLE OF AUTHORITIES, CONT'D

Pub. L. 93-205,	
§ 4(b), 87 Stat. 887	20
§ 11(g)(1)(A), 87 Stat. 900	24
§ 11(g)(1)(B), 87 Stat. 900	24
Pub. L. 95-632	
§ 3, 92 Stats. 3753	19
§ 3, 92 Stat. 3753	20
§ 11, 92 Stat. 3764	19
§ 11(4), 92 Stat. 3765	20
§ 11(7), 92 Stat. 3766	20
Pub. L. 96-159	
§ 4(1), 93 Stat. 1226	21
Pub. L. 97-304	
§ 7(2), 96 Stat. 1425	24
Act of Feb. 9, 1905, ch. 567, 33 Stat. 714	2
 <u>State Statutes</u>	
Cal. Stats. 1905, ch. 6, p. 4	1
 <u>Congressional Documents</u>	
H.R. Rep. 1491(I), 94th Cong., 2d Sess. 26 (1976)	26
H.R. Rep. 218, 95th Cong., 1st Sess. 90 (1977)	25

TABLE OF AUTHORITIES, CONT'D

H.R. Rep. 1625, 95th Cong., 2d Sess. (1978)	
p. 7	24
pp. 10-11	19
p. 13	19
p. 14	19
p. 17	19, 20
H.R. Conf. Rep. 697, 96th Cong., 1st Sess. 10 (1979)	22
H.R. Rep. 567, 97th Cong., 2d Sess. 10 (1982)	19
H.R. Conf. Rep. 835, 97th Cong., 2d Sess. 35 (1982)	24
S. Conf. Rep. 1236, 92d Cong., 2d Sess., 146 (1972)	25
S. Rep. 307, 93rd Cong., 1st Sess. 11 (1973)	24
S. Rep. 874, 95th Cong., 2d Sess. (1978)	
p. 2	18
p. 3	19
S. Rep. 418, 97th Cong., 2d Sess. 25 (1982)	22
118 Cong. Rec. 33717 (1972)	26
119 Cong. Rec. 25676 (1973)	24
125 Cong. Rec. (1979)	
pp. 28940-28941	22
p. 28941	21
p. 29050	22
124 Cong. Rec. (1978)	
p. 21132	20
pp. 21131-21132	19

TABLE OF AUTHORITIES, CONT'D

124 Cong. Rec. (1978) Cont'd	
p. 21133	20
p. 21136	21
p. 21137	19
p. 21138	19
p. 21142	20
p. 21347	19, 22
p. 37115	19, 21
p. 37116	19
p. 38123	18, 20, 21
pp. 38123-38124	19
p. 38125	19, 21
p. 38126	19
p. 38127	20, 21
p. 38128	19, 20
p. 38131	19, 20
p. 38132	19
p. 38133	19
p. 38134	20
p. 38138	18
pp. 38145-38146	19
p. 38156	20
p. 38666	20
pp. 98803-98804	18, 20
p. 98805	18, 20

INTEREST OF AMICUS CURIAE

Amici States are vitally interested in the scope of standing under the citizen suit provision of the Endangered Species Act ("ESA"), section 11(g)(1), 16 U.S.C. § 1540(g)(1). Because States are "persons" within the meaning of the ESA, see section 3(13), 16 U.S.C. § 1532(13), they are entitled to sue under the citizen suit provision. Consequently, the States' ability to pursue judicial remedies for violations of the ESA is directly affected by the interpretation of the scope of ESA standing.

Amici States also have a strong interest in the implementation of the ESA provisions that were allegedly violated in this case, sections 4 and 7 of the ESA, 16 U.S.C. §§ 1533, 1536. A great deal of land, resources, and productive economic activity within amici States is subject to regulation under sections 4 and 7 of the ESA. If litigants whose economic interests are harmed by the Federal Government's violation of sections 4 and 7 lack standing to challenge those ESA violations, then the economic well-being of States and their citizens will be diminished unlawfully without judicial recourse.

The State of California also has a particular interest in this case. The Klamath Project, which is the reclamation project at issue in this case, is located partly in California. The State of California ceded land to the United States, and authorized the lowering of the levels of certain lakes, including Clear Lake, for the Klamath Project. See Cal. Stats. 1905, ch. 6, p.4. Clear Lake Reservoir, one of the two reservoirs involved in this litigation, is located entirely in California. See Pet. App. 32, ¶1; 34, ¶5 C, D. Consequently, California has a close connection with, and strong interest in, this controversy over the operation of the Klamath Project, and the allocation of water from Clear Lake Reservoir.

STATEMENT OF THE CASEA. Nature of the Controversy

The Klamath Project was an early reclamation project undertaken by the U.S. Bureau of Reclamation ("Bureau") pursuant to the Reclamation Act of 1902 (codified at various provisions of 43

U.S.C. section 371 et seq.). Pet. App. 35. Authorized by Congress in 1905, see Act of Feb. 9, 1905, ch. 567, 33 Stat. 714, the Klamath Project consists of several dams and reservoirs along the California-Oregon border. *Id.* at 35-36. The purpose of the project was to reclaim certain lands, and store and deliver irrigation water to the reclaimed lands for agricultural and other productive uses. Gerber Reservoir, located in Oregon, and Clear Lake Reservoir, located in California, are parts of the Project. *Id.* at 34.

Petitioners, Horsefly Irrigation District and Langell Valley Irrigation District, have water supply contracts with the Bureau to receive water from the Gerber and Clear Lake Reservoirs. *Id.* at 34. Petitioners Bennett and Giordano are ranchers and members of these irrigation districts who receive water from Clear Lake Reservoir under the irrigation district contracts with the Bureau. For most of this century, the Bureau has stored and released water from these reservoirs according to standard operational procedures which maintained a reliable supply of irrigation water to farmers and ranchers in the area. *Id.* at 36.

In 1988, the U.S. Fish and Wildlife Service ("FWS") listed the Lost River sucker and the shortnose sucker as endangered species of fish under the ESA. 53 Fed. Reg. 27130-27134 (1988). The shortnosed sucker is found in Gerber and Clear Lake Reservoirs, and the Lost River sucker is found in Clear Lake Reservoir, among other places. Pet. App. 36; see also 59 Fed. Reg. 61744-61758 (1994) (proposed designation of critical habitat for the Lost River and shortnosed suckers).

Following the listing of the fish as endangered, the Bureau entered into formal consultation with the FWS pursuant to section 7 of the ESA, 16 U.S.C. § 1536. The purpose of this consultation was to assess the effects of the long-term operation of the Klamath Project upon the endangered fish. As a result of this consultation, the FWS issued a 1992 Biological Opinion which concluded that Klamath Project operations, including releases of water from the Clear Lake and Gerber Reservoirs for irrigation pursuant to long-standing operational procedures, would likely jeopardize the continued existence of the fish. The FWS also specified in its Biological Opinion "reasonable and prudent alternatives" that the FWS believed would avoid jeopardy to the fish. These reasonable and prudent alternatives included restrictions on releases of

irrigation water and the maintenance of certain lake levels in the Gerber and Clear Lake Reservoirs. The Biological Opinion also contained an "incidental take" statement describing the "take" or loss of endangered fish that was expected to occur if the Bureau operated the project in accordance with the FWS' reasonable and prudent alternatives. So long as the Bureau operated the Klamath Project in accordance with the reasonable and prudent alternatives specified in the biological opinion -- including the requirement to maintain certain lake levels in Gerber and Clear Lake Reservoir -- this "incidental take" statement would immunize the Bureau from civil and criminal liability for the "take" of endangered suckers resulting from operation of the Klamath Project. See 16 U.S.C. § 1536(o)(2); 50 C.F.R. § 402.14(i)(5).

B. Proceedings Below

Petitioners filed suit against respondents, the Secretary of the Interior and FWS officials, alleging that respondents violated the ESA and the Administrative Procedure Act ("APA") in the section 7 consultation over the Klamath Project. Pet. App. 33, 40-42. Petitioners alleged that the maintenance of certain lake levels in the Gerber and Clear Lake Reservoirs pursuant to the Biological Opinion deprived them of irrigation water that otherwise would be available for release from the reservoirs. *Id.* at 34, 40. The complaint alleged two main theories why the Biological Opinion was invalid and should be set aside. The first was that respondents failed to use the "best scientific data available," as required under section 7(a)(2) of the ESA, in formulating the Biological Opinion, and in concluding that irrigation releases from the reservoirs were jeopardizing the endangered fish and that maintaining certain lake levels would help the fish. *Id.* 37-41. The second theory was that the Biological Opinion implicitly determined "critical habitat" for the endangered fish without considering the economic impacts of such designation, as is required under section 4(b)(2) of the ESA, 16 U.S.C. § 1533(b)(2). According to the complaint, the specification in the Biological Opinion of certain lake levels that had to be maintained in Gerber and Clear Lake Reservoirs was essentially a determination of the "critical habitat" for the fish. Section 4 of the ESA specifies that the FWS must consider

economic impacts when designating critical habitat for a species. However, by using the Biological Opinion as a vehicle for designating critical habitat, the FWS had wrongly circumvented the section 4 requirement to consider economic impacts.^{1/}

The Ninth Circuit affirmed the district court's dismissal of the action for lack of standing. The Ninth Circuit reasoned that the prudential "zone of interests" test applied, and that "only plaintiffs who allege an interest in the preservation of endangered species fall within the zone of interests protected by the ESA." Pet. App. 11 (emphasis in original). The Ninth Circuit expressed the view that, because petitioners wanted to use project water for irrigation and recreational purposes rather than species preservation, they were asserting a "competing interest" in the water that was "inconsistent with the [ESA's species preservation] purposes." *Id.* at 17. This Court granted certiorari on March 25, 1996.

SUMMARY OF ARGUMENT

I

Under section 10 of the APA, any person "aggrieved by agency action within the meaning of a relevant statute" is authorized to maintain an action challenging such agency action. 5 U.S.C. § 702. This Court, however, has adopted prudential standing requirements limiting the right of persons to challenge agency action under the APA. Under these prudential requirements, actions can

1. The FWS' subsequent actions lend credence to petitioners' theory of "implicit designation" of critical habitat. When the FWS listed the suckers as endangered in 1988, it postponed designation of critical habitat for the fish. Environmental organizations then sued the FWS in 1991 for failure to designate critical habitat for the fish. See 59 Fed. Reg. 61745 (1994) (describing the litigation). The FWS subsequently proposed critical habitat for the fish in 1994 which included specified lake levels for the Gerber and Clear Lake Reservoirs, known as "full pool elevation". See 59 Fed. Reg. 61744, 61750, 61754-61755, 61756-61758 (1994). Therefore, the FWS has acknowledged that maintaining specified lake levels of the Gerber and Clear Lake Reservoirs--which is what the 1992 Biological Opinion purported to do--constitutes the designation of critical habitat for the endangered suckers.

be maintained only by persons whose interests fall within the "zone of interests" that are "protected or regulated" by the relevant statute. *Clarke v. Securities Industries Association*, 479 U.S. 388 (1987); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970). The "zone of interests" test is a guide for determining whether Congress intended to authorize particular plaintiffs to maintain actions challenging particular agency actions.

The "zone of interests" test, by providing that both "protected" and "regulated" parties have standing to challenge agency action, ensures that litigants have access to the courts regardless of whether they benefit from, or are burdened by, the statutory scheme. Litigants whose interests are "protected" by a statute have an incentive to guard against lax agency enforcement, and to ensure that the agency protects their interests as vigorously as Congress intended. In contrast, litigants whose interests are "regulated" by the statute have an incentive to guard against overzealous administrative enforcement which goes beyond the bounds set by Congress. In other words, those who are "protected" have an incentive to guard against underregulation, and those who are "regulated" have an incentive to guard against overregulation. The "zone of interests" test thus affords standing both to those who benefit from the regulatory scheme and those who are burdened by it. The Ninth Circuit, by holding that prudential standing extends only to those who pursue environmental goals, allows parties who are perceptibly benefitted by the statute to challenge agency action, but not parties who are burdened by it. Thus, the Ninth Circuit decision effectively allows challenges by those who charge that the agency has underregulated, but not by those who charge that the agency has overregulated.

In several cases involving the standing of competitors, this Court has held that parties have standing to challenge agency action if they are directly affected by the agency action, whether or not the agency action promotes their interests or otherwise directly applies to them. *Data Processing*, 397 U.S. 150; *Arnold Tours, Inc. v. Camp*, 401 U.S. 45 (1970); *Investment Company Institute v. Camp*, 401 U.S. 617 (1971); *Clarke*, 479 U.S. 388. It is sufficient, this Court has stated, that the plaintiffs, although not directly regulated by the statute, are in competition with those who are directly

regulated. Such plaintiffs have standing because they are "directly affected" by the agency action. *Clarke*, 479 U.S. at 399 n. 14; *Data Processing*, 397 U.S. at 157.

The petitioners in this case meet prudential standing requirements under the ESA and are authorized to maintain an action under the APA, just as the plaintiffs were held to have standing in the competitor cases. The Secretary of the Interior has issued a Biological Opinion recommending that the Bureau of Reclamation reduce water deliveries to its contractors, including the petitioners, in order to protect certain endangered species in the reservoir. Under the ESA, the Bureau of Reclamation is subject to civil and criminal liability if it improperly jeopardizes an endangered species; the Bureau is immune from such liability, however, if it complies with the recommendations in the Secretary's Biological Opinion. Therefore, as a practical matter, the Bureau has no choice other than to comply with the Secretary's recommendation. Accordingly, the Secretary's Biological Opinion adversely affects the water rights held by the petitioners. The petitioners' interests are directly affected by agency action in the same way that the plaintiffs' interests were directly affected in the competitor cases. Moreover, this Court has recognized that water users, such as petitioners, who have contractual rights to water developed under the federal reclamation laws are the beneficial owners of the water. *Nevada v. United States*, 463 U.S. 110, 122-126 (1983); *State of Nebraska v. State of Wyoming*, 325 U.S. 589, 614-616 (1945); *Ickes v. Fox*, 300 U.S. 82, 94-95 (1937). Hence, the petitioners fall within the regulatory ambit of the ESA, and are authorized to maintain their action under the APA.

The petitioners are not only "regulated" by the ESA, but also, in a sense, are "protected" by it. Section 4(b)(2) of the ESA requires the Secretary to consider "economic impact[s]" in designating critical habitats. 16 U.S.C. § 1533(b)(2). Section 7 of the ESA requires the Secretary to use the "best scientific data" in determining whether to list endangered species. 16 U.S.C. § 1536. Thus, the ESA requires the Secretary of the Interior to follow certain procedures and apply certain methodologies in listing endangered species and designating critical habitats. These provisions impose constraints on agency action under the ESA for the benefit of those, such as petitioners, who may be burdened by

the species protection goals of the ESA. When these constraints are not followed, the economic interests of the petitioners--who are in "competition" with fish for scarce water--are impaired. In short, the statutory goals of the ESA in protecting endangered species are carried forth through methodologies and procedures that inure to the benefit of the petitioners. The petitioners are within the zone of interests protected and regulated by the ESA for this additional reason.

II

The citizen suit provision of the ESA broadly provides that "any person" has standing to challenge an agency action that is in "violation" of the act. On its face, this language suggests that Congress intended to wholly abrogate prudential standing requirements as applied to parties who maintain actions under the ESA, subject only to the limitation that such parties must meet Article III standing requirements. To be sure, the legislative history of the citizen suit provision of the Clean Water Act indicates that Congress' primary objective was to ensure that parties would have standing to pursue environmental goals, whether or not they have economic interests at stake. Thus, it can be argued that Congress meant to abrogate prudential standing requirements only for those who pursue environmental goals.

The better view, the amici states believe, is that Congress meant to abrogate prudential standing requirements for all parties who allege a violation of the ESA, whether or not they pursue environmental goals. This view is clearly and unambiguously supported by the statutory language, which is a more reliable indicator of the congressional intent than the legislative history. Moreover, although the legislative history indicates that Congress intended to broaden standing for those seeking to promote environmental goals, the legislative history does not indicate that Congress did not intend to similarly broaden standing for parties who assert economic interests that are in competition with environmental goals. Thus, the citizen suit provision, properly construed, abrogates prudential standing requirements for all who maintain actions under the ESA, including those, such as the petitioners, who assert economic interests.

Whether or not the citizen suit provision abrogates prudential standing requirements for those who assert economic rather than environmental interests, the provision does not reduce or alter the standing that such parties might have under other statutory provisions to challenge agency action under the ESA. The citizen suit provision is not the exclusive remedy for ESA violations, and was not intended to preclude review of administrative action under the APA. Indeed, the citizen suit provision expressly provides that "[t]he injunctive relief provided by this subsection shall not restrict any right which any person . . . may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Secretary or a State agency)." 16 U.S.C. § 1540(g)(5) (emphasis added). Section 12 of the APA, 5 U.S.C. § 559, also provides that subsequent legislation shall not supersede or modify the right of review granted by section 10 of the APA unless the language in a subsequent statute "expressly" so provides. Here, petitioners have asserted their claims under both the citizen suit provision of the ESA and section 10 of the APA. As explained above, the petitioners have standing to challenge agency action under section 10 of the APA. Therefore, they are authorized to maintain their action regardless of how the citizen suit provision is construed.

Finally, whether or not the citizen suit provision of the ESA abrogates prudential standing requirements for those asserting economic interests, the provision clearly affords a cause of action for such persons if they are able to satisfy prudential standing requirements. The contrary view would wholly disregard the clear statutory language affording a cause of action to "any person" who asserts a "violation" of the ESA. As indicated above, the petitioners meet prudential standing requirements under the ESA, and thus are authorized to maintain an action under the citizen suit provision in any event.

ARGUMENT

I. PETITIONERS HAVE STANDING UNDER SECTION 10 OF THE ADMINISTRATIVE PROCEDURE ACT.

A. Constitutional Standing

Under section 10 of the APA, any person "aggrieved by agency action within the meaning of a relevant statute" may maintain an action challenging such agency action. 5 U.S.C. § 702. Notwithstanding this provision, Article III of the Constitution authorizes such persons to challenge agency action only (1) they suffer "injury in fact"; (2) there is a "causal connection" between the injury and the agency action; and (3) it is "likely" that the injury will be "redressed" by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992); *Valley Forge Christian College v. Americans United*, 454 U.S. 464, 472 (1982); *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976); *Sierra Club v. Morton*, 405 U.S. 727, 740-741 (1972). To be cognizable under Article III, "injury in fact" must be to a "legally protected interest" that is both (1) "concrete and particularized" and (2) "actual or imminent, not 'conjectural or hypothetical.'" *Lujan, supra*, at 560. The "causal connection" must be such that the injury is "traceable" to the agency action, and is not the result of "independent action of some third party not before the court." *Id.*^{2/}

The Solicitor General argued in his opposition to the petition for writ of certiorari that the petitioners lack constitutional standing because--although they may have suffered injury in fact--there is no causal connection between their injury and the agency action of which they complain, and their injury cannot be redressed by a

2. One who asserts "procedural rights," such as failure to hold a hearing prior to denial of a license or failure to prepare an environmental impact report for a project located next door, may not be required to meet "all the normal standards for redressability and immediacy." *Lujan, supra*, 504 U.S. at 572 n. 7.

favorable decision. According to this argument, the Biological Opinion merely provided certain recommendations, and the Bureau voluntarily complied with the recommendations by reducing water deliveries to the petitioners; therefore, the agency action that caused the petitioners' injury was that of the Bureau rather than the Secretary.

The Solicitor General's argument is misplaced for two reasons. First, the Ninth Circuit and the district court specifically declined to consider the argument. Pet. App. 4, 27. Therefore, the argument should not be considered by the Court in this proceeding, but should only be considered on remand if this Court reverses the judgment below.

Second, the Solicitor General's argument is erroneous on the merits. Under the ESA, the Secretary is required to issue a biological opinion after determining that a proposed federal agency action may affect an endangered species or its critical habitat, and is required to suggest "reasonable and prudent alternatives" in cases where "jeopardy [of the species] or adverse modification [of critical habitat]" is found. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14. The federal agency--in this case, the Bureau--is required, after consultation with the Secretary, to ensure that its action "is not likely to jeopardize the continued existence of any endangered species or threatened species" or result in the destruction of the "critical habitat" of any such species. Section 7(a)(2), 16 U.S.C. § 1536(a)(2). Obviously the way that the federal agency fulfills its obligation of avoiding jeopardy to endangered species is by complying with the recommendations in the Secretary's Biological Opinion. Indeed, the federal agency is subject to liability under the ESA if it fails to avoid jeopardizing an endangered species or impairing critical habitat. 16 U.S.C. §§ 1532(13) (federal agencies are "persons"), 1540(a) (civil penalties), 1540(b) (criminal penalties), 1540(g) (injunctive relief). Typically, as in this case, the Biological Opinion contains an "incidental take" statement describing the "take" or loss that is expected to occur if the federal agency follows the reasonable and prudent alternatives in the opinion; the federal agency is immunized from civil and criminal liability if it follows these alternatives. See 16 U.S.C. § 1536(c)(2); 50 C.F.R. § 402.14(i)(5). In short, the federal agency has a defense to liability if it complies with the secretarial

determinations, and lacks such a defense if it does not. Therefore, although the ESA does not specifically require the Bureau to comply with the secretarial determination here, the Bureau has little choice, as a practical and legal matter, other than to comply.

This Court has held that constitutional standing requirements are satisfied if the plaintiff's injury is "fairly traceable" to the action of a particular agency, and if it is "likely" that the injury will be redressed if the agency action is reversed. *Lujan, supra*, 504 U.S. at 560 (emphasis added). Certainly the Bureau would not have restricted water deliveries to petitioners if the Secretary had not issued his Biological Opinion. By the same token, the Bureau obviously would not continue such restrictions if the Secretary's opinion were reversed. Therefore, the petitioners' injury here is "fairly traceable" to the Biological Opinion, and will "likely" be redressed if the Biological Opinion is reversed. Accordingly, the petitioners satisfy Article III standing requirements.

B. Prudential Standing

Even if a party has satisfied constitutional standing requirements in challenging agency action under section 10 of the APA, certain "prudential" limits may still apply. *Valley Forge Christian College, supra*, 454 U.S. at 474-475; see *Clarke v. Securities Industry Ass'n*, 479 U.S. 388 (1987); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979); *Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970). One such prudential limit is the requirement that "the plaintiff's complaint fall within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Valley Forge Christian College, supra*, 454 U.S. at 475, quoting *Data Processing, supra*, 397 U.S. at 153; see also *Clarke, supra*, 479 U.S. at 396-400.³ The "zone of

3. The "zone" test for standing is distinguishable from, and less stringent than, the test for implying a private right of action. See *Clarke, supra*, 479 U.S. at 400 fn. 16. Under *Cort v. Ash*, 422 U.S. 66, 78 (1975), a private right of action may be implied only if the litigant is a member of a class for whose "especial benefit" the statute was enacted. However, under

interests" test is a guide for determining whether Congress intended to authorize particular plaintiffs to bring actions challenging particular agency actions; Congress presumptively does not intend to authorize actions by plaintiffs whose interests are "marginally related to or inconsistent with the purpose implicit" in the statute. *Clarke, supra*, 479 U.S. at 399; see *Data Processing, supra*, 397 U.S. at 164. Because the zone of interests test is a guide in determining congressional intent, the question whether the test applies to a particular statute, and the kind of interests that are included within the zone, must be determined by reference to congressional intent.

The rationale for the zone of interests test is that Congress presumptively intends that a plaintiff should have sufficiently particularized and adverse interests to ensure that he will be a "reliable attorney general to litigate the issues of the public interest," *Data Processing, supra*, 397 U.S. at 154; *Clarke, supra*, 479 U.S. at 397 n. 12, and to minimize the "potential for disruption inherent in allowing every party adversely affected by agency action to seek judicial review," *Clarke, supra*, 479 U.S. at 397. Litigants should be allowed to raise questions of "broad social import" only if they are "best suited to assert a particular claim," and only if their "individual rights would be vindicated." *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979). Generally, the zone of interests is more rather than less inclusive; "[w]here statutes are concerned, the trend is towards enlargement of the class of people who may protest administrative action." *Data Processing, supra*, 397 U.S. at 154.

In several cases involving the standing of competitors, this Court has held that parties have standing to challenge agency action if they are directly affected by the agency action, whether or not the agency action promotes their interests or otherwise directly applies to them. See *Data Processing, supra*, 397 U.S. 150, *Arnold Tours, Inc., supra*, 400 U.S. 45, *Investment Company Institute, supra*, 401 U.S. 617, and *Clarke, supra*, 479 U.S. 388. In these cases, the

the "zone" test for standing, "there need be no indication of congressional purpose to benefit the would-be plaintiff." *Clarke, supra*, 479 U.S. at 399-400.

Comptroller of the Currency had adopted administrative decisions allowing banks to enter certain non-banking fields of business. *Data Processing, supra* (data processing services); *Arnold Tours, supra* (travel services); *Investment Company Institute, supra* (collective investment funds); *Clarke, supra* (discount brokerage services). Non-banking entities that were already competing in these fields challenged the Comptroller's decisions, contending that their economic interests would be injured if the Comptroller's decisions were upheld. According to the competitors, the banking laws restricted the business activities that banks could conduct, and the Comptroller had violated these laws by allowing banks to enter these fields.

This Court found that all of these competitor plaintiffs had prudential standing under the "zone of interests" test. Significantly, the banking laws were not intended to protect or promote the economic interests of these bank competitors; Congress had restricted bank activities not to benefit bank competitors, but to protect the general public by assuring a sound banking system.⁴ Moreover, the competitors were not the objects of the challenged agency action; rather, the agency action applied directly to the banks. Nonetheless, the competitors were held to have standing because, as the Court stated, they were "directly affected" by the agency action. *Data Processing, supra*, 397 U.S. at 157; *Clarke, supra*, 479 U.S. at 399 n. 14. Because of this effect, they were "reliable attorneys general" for the purpose of litigating the issues of the public interest. *Clarke*, 479 U.S. at 397 n. 12, quoting *Data Processing*, 397 U.S. at 154. Therefore, the "regulated"

4. See *Arnold Tours, Inc. v. Camp, supra*, 400 U.S. at 46 ("In *Data Processing* we did not rely on any legislative history showing that Congress desired to protect data processors alone from competition."); *Clarke, supra*, 479 U.S. at 396 n. 10 (noting that in *Arnold Tours, Inc.*, "[t]he Court found it of no moment that Congress never specifically focused on the interests of travel agents in enacting section 4 of the Bank Service Corporation Act") (emphasis added). As the Court noted in *Clarke*, Justice Harlan in dissent in *Investment Company Institute* had argued that "there was no evidence that Congress had intended to benefit the plaintiff's class when it limited the activities permitted national banks" and "[t]he Court did not take issue with this observation". 479 U.S. at 398 (emphasis added).

component of the "zone" test accords standing to those who are directly and adversely affected by the regulation, and thus are burdened by it.

This pattern of competitive standing applies to the petitioners here. Just as the bank competitors had standing because they were injured economically by the Comptroller's decisions allowing banks to compete with them, the petitioners have standing because they were economically harmed by the Secretary's decision reallocating water to the fish with whom they "compete" for scarce water. Just as the bank competitors' economic interests were within the zone of interests of the banking laws even though the purpose of those laws was not to economically benefit bank competitors, the petitioners' interests are within the "zone of interests" even though the purpose of the ESA is not to benefit water users in competition with endangered fish. In short, the petitioners have standing because, like the plaintiffs in the competitor cases, their economic injury flows directly and immediately from the agency action. Like the competitors, the petitioners are "reliable attorneys general" for the purpose of litigating the issues of public interest.

The competitor cases build upon earlier cases recognizing economic injury as a standing basis. In *Federal Communications Comm. v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940), Sanders Brothers' radio station, which would have been harmed economically from competition by a new licensee, was held to have standing to challenge the Federal Communications Commission's ("FCC") issuance of a radio license to a rival station. The FCC argued that the FCC could not permissibly consider economic injury to competitors in its licensing decisions, and therefore that Sanders lacked standing under section 10 of the APA to challenge the FCC decision. *Id.* at 472. Although this Court agreed that the FCC could not permissibly consider the economic injury issue in its decision, the Court nonetheless held that the competitor's economic injury afforded standing to challenge the agency action. As the Court stated, "It does not follow that, because [Sanders] cannot resist the grant of a license to another on the ground that the resulting competition may work economic injury to him, he has no standing to appeal from the order of the [FCC] granting the application." 309 U.S. at 476. Thus, once Sanders had standing because of his economic injury, he was entitled to challenge the

FCC decision on broader "public convenience and necessity" grounds. As in the competitor cases, the economic interest that gave Sanders standing need not be recognized as a "purpose" or "objective" or substantive policy in the relevant regulatory statute.

This Court has also held that a party not directly regulated by administrative action still has standing to challenge that action if the action affects the party's contractual relations with a regulated party. In *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407 (1942), this Court upheld CBS' standing to challenge an FCC regulation restricting network broadcasting, stating that CBS' standing is "unaffected by the fact that the regulations are not directed to [CBS] and do not in terms compel action by it or impose penalties upon it because of its action or failure to act;" rather, it is sufficient that the regulations "purport to operate to alter and affect adversely [CBS'] contractual rights and business relations with station owners whose applications for licenses the regulations will cause to be rejected and whose licenses the regulations may cause to be revoked." *Id.* at 422 (emphasis added). See also *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 198-200 (1956).

In *Cotovsky-Kaplan Physical Therapy Assn, Ltd. v. United States*, 507 F.2d 1363 (7th Cir. 1975), the Seventh Circuit, per then-Judge Stevens, used the same logic in holding that an party whose contractual interests were affected by agency action was within the "zone of interests" of the statute, and thus had standing to challenge the agency action. The court stated that if a government agency "regulates the contractual relationships between a regulated party and an unregulated party, the latter as well as the former may have interests that are arguably within the regulated zone for purposes of testing standing." *Id.* at 1367 (emphasis added).

Here, petitioners' water supply contracts with the Bureau were directly and adversely affected by the Secretary's action under the ESA. The Bureau, in order to comply with the reasonable and prudent alternatives in the biological opinion, was compelled to reduce petitioners' entitlement to water under their contracts with the Bureau; there was no other way that the Bureau could comply with the Biological Opinion's reasonable and prudent alternatives and avoid potential criminal liability for an illegal "take." Consequently, even if the Bureau is deemed to be the direct object

of the Secretary's ESA action, petitioners still have standing based on the impairment of their contractual relations with the Bureau. Therefore, the petitioners are, for all practical purposes, the regulatory objects of the challenged ESA action.

The petitioners are also, to a degree, "protected" by the ESA, and thus fall within the "zone of interests" for this additional reason. Section 4(b)(2) of the ESA requires the Secretary to consider "economic impact[s]" in designating critical habitats. 16 U.S.C. § 1533(b)(2). Section 7 of the ESA requires the Secretary to use the "best scientific data" in determining whether to list endangered species. 16 U.S.C. § 1536. Thus, the statutory goals of the ESA are not only to protect endangered species, but also to impose certain constraints on agency action for the benefit of those adversely affected by such regulation. Specifically, the Secretary, in designating critical habitats, is mandated to consider the "economic impact[s]" on those, such as petitioners, whose economic interests would be affected. The Secretary, in determining whether to list an endangered species, must use the "best" scientific data, to ensure that the adverse consequences of listing will not occur on the basis of inadequate data. These constraints protect and inure to the benefit of those, such as petitioners, whose economic interests are affected by agency actions listing endangered species and designating critical habitats. Thus, the petitioners' interests are among those that are within the sweeping regulatory concern of the ESA. Indeed, this Court has held that parties, like the petitioners, who hold contracts for delivery of water from federal reclamation projects are the "beneficial owners" of the water. *Nevada v. United States*, 463 U.S. 110, 122-126 (1983); *State of Nebraska v. State of Wyoming*, 325 U.S. 589, 614-616 (1945); *Ickes v. Fox*, 300 U.S. 82, 94-95 (1937). Therefore, the petitioners have a recognized concern under federal law regarding agency decisions affecting delivery of water. For these reasons, the petitioners are not only "regulated" by the act, but also are "protected" by it.

The Ninth Circuit's view that prudential standing is limited to those seeking to further environmental goals would lead to completely one-sided enforcement of environmental statutes, such as the ESA. Under this view, litigants could challenge agency action on grounds that the Government underregulated and failed to adequately protect endangered species, but not on grounds that the

agency overregulated and failed to base its decision on valid scientific data, or failed to adequately consider economic impacts. Thus, the litigant could permissibly challenge the adequacy of the scientific data that supports the Biological Opinion, if the litigant argues that scientific data supports greater protection of the species; the litigant could not, however, make the same argument if the litigant argues that scientific data supports less protection. The inequity and absurdity of this result is reflected in the Ninth Circuit's view that the petitioners lack standing because they argue that the biological opinion is "not necessary to preserve the fish" and that "the suckers are doing just fine." App. 16. Under this view, the petitioners cannot even argue that the Secretary's Biological Opinion is scientifically unnecessary to preserve the species, regardless of the effect on their rights. Under the Ninth Circuit view, the prudential standing doctrine is less a "standing" doctrine than one that precludes certain causes of action based on their merits and objectives. This view lacks the requisite application of neutral principles to be a viable basis for determining who can gain access to the courts.

Indeed, the Ninth Circuit decision would virtually preclude challenges to Biological Opinions issued under the ESA, to the extent that such challenges assert that an endangered species has been overregulated. Certainly environmental plaintiffs are unlikely to sue the Secretary for overprotecting a species. It is unlikely that the affected federal agency would sue a sister agency, the FWS, or its department head, the Secretary, to challenge the Biological Opinion; under the "unitary" system of the federal government, interagency differences are generally resolved internally within the government rather than by litigation between different agencies. Cf. *Nevada v. United States*, *supra*, 463 U.S. at 127-128. Consequently, only parties situated similarly to the petitioners would bring lawsuits charging that the Secretary has overregulated under the ESA. Certainly, the Ninth Circuit failed to identify any alternative plaintiff better situated to bring such claims. The likelihood, or lack thereof, that another party may bring the type of claims asserted by petitioners is a relevant factor in determining the standing issue. *Block v. Community Nutrition Institute*, 467 U.S. 340 (1984); *Joint Anti-Fascist Committee Refugee Committee v. McGrath*, 341 U.S. 123, 154 (1951) (Frankfurter, J., concurring);

Barlow v. Collins, *supra*, 397 U.S. at 175 n. 9 (Brennan, J., dissenting).

The Ninth Circuit's approach raises significant due process concerns in that parties whose interests are directly and adversely affected by agency action apparently lack a remedy to challenge such action. Cf. *Yakus v. United States*, 321 U.S. 414, 431-434 (1944). Certainly parties whose rights are unconstitutionally "taken" or otherwise adversely affected by agency action must have standing under constitutional principles to seek redress, particularly if they satisfy Article III standing requirements. Under a proper application of prudential standing principles, this potential constitutional problem does not arise, because parties have access to the courts whether the interests that they seek to vindicate are congruent with statutory objectives or not.

C. Legislative History

The legislative history of the ESA reveals that the act, although originally enacted to pursue species protection goals, has been significantly amended to provide for broader consideration of economic impacts in competition with those goals. Thus, the statutory goals have expanded to provide for more balanced consideration of economic interests. In this sense, economic interests are not only "regulated" by the act, but also, to a degree, are "protected" by it.

As noted earlier, section 4(b)(2) of the ESA requires the Secretary to consider "economic impact[s]" in designating critical habitats. 16 U.S.C. 1533(b)(2). This provision was added as part of the 1978 amendments to the ESA. These amendments were designed to moderate the species protective character of the original legislation.⁵ Among other things, the amendments added an exemption to the section 7 consultation requirement, so that projects threatening jeopardy to species could nonetheless be authorized in certain circumstances by the Endangered Species Committee. See

5. See S. Rep. 874, 95th Cong., 2d Sess. 2 (1978); 124 Cong. Rec. 38123 (1978) (Rep. Bowen); *id.* at 38138 (Rep. Burgener); *id.* at 9803-98804 (Sen. Culver); *id.* at 9805 (Sen. Wallop).

Pub. L. 95-632, Section 3, 92 Stats. 3753, now codified at various provisions of 16 U.S.C. § 1536(e)-(p). In addition to requiring that economic impacts be considered in designating critical habitat, the 1978 amendments also provided for greater public participation in the habitat designation process, particularly by those in the affected area. Pub. L. 95-632, § 11, 92 Stat. 3764.

The 1978 amendments were described in the congressional debates as introducing greater "flexibility" into the ESA by requiring some balancing of economic and developmental interests against the interest in species protection.⁶ The intent was to avoid having important public works projects blocked entirely by ESA requirements.⁷ Thus, the 1978 amendments were partly a response to this Court's decision in *TVA v. Hill*, 437 U.S. 153 (1978), which had halted completion of the Tellico Dam because of a congressional purpose in the ESA to protect endangered species whatever the cost.⁸ Because other major development projects were threatened by ESA requirements, members of Congress acknowledged the need to introduce "balance" and "flexibility" to avoid more extreme attempts at repeal of the ESA. See 124 Cong.

6. See H.R. Rep. 1625, 95th Cong., 2d Sess. 14 (1978) (the House bill introduces "some flexibility which will permit exemptions from the Act's stringent requirements"); *id.* at 13 ("flexibility" for Federal actions which cannot be completed without conflicting with section 7); *id.* at 17 ("flexibility" in determining critical habitat); S. Rep. 874, *supra*, at 3 (noting the "need for an amendment to the act which will provide flexibility in its administration"); 124 Cong. Rec. 38123-38124 (1978) (Rep. Bowen); *id.* at 38128 (Rep. Anderson); *id.* at 38132 (Rep. Murphy); *id.* at 38133 (Rep. Leggett); *id.* at 9804 (Sen. Baker); *id.* (Sen. Randolph); *id.* at 21133 (Sen. Culver); *id.* at 21137 (Sen. Wallop); *id.* at 21347 (Sen. Culver); see also H. R. Rep. 567, 97th Cong., 2d Sess. 10 (1982).

7. See 124 Cong. Rec. 37115 (1978) (Rep. Lott); *id.* (Rep. Whitten); *id.* at 38125 (Rep. Beard); *id.* at 38127 (Rep. Buchanan); *id.* at 38133 (Rep. Leggett); *id.* at 38145-38146 (Rep. Bowen).

8. See H. R. Rep. 1625, *supra*, at 10-11; S. Rep. 874, *supra*, at 2; 124 Cong. Rec. 37116 (1978) (Rep. Beard); *id.* at 38123-38124 (Rep. Bowen); *id.* at 38126 (Rep. Dingell); *id.* at 38131 (Rep. Hughes); *id.* at 38132 (Rep. Murphy); *id.* at 38133 (Rep. Leggett); *id.* at 21131-21132 (Sen. Culver); *id.* at 21138 (Sen. Baker).

Rec. 38133 (1978) (Rep. Leggett); *id.* at 38134 (Rep. Lehman); *id.* at 9805 (Sen. Wallop); *id.* at 21132 (Sen. Culver); *id.* at 21342 (Sen. Baker).

In presenting the conference report, Representative Murphy, the House floor manager, described the section 4(b)(2) requirement to consider economic impacts as "the most significant provision in the entire bill." 124 Cong. Rec. 38666 (1978). Representative Buchanan explained in the earlier House debates that this provision would make the Secretary be "more judicious" in specifying critical habitat so that the construction of needed projects would not be paralyzed. *Id.* at 38128. House Report 1625 also noted that with the requirement to consider economic impacts, the Committee expected that "the resultant critical habitat will be different from that which would have been established using solely biological criteria," and that in some situations "no critical habitat will be specified." H.R. Rep. 1625, *supra*, at 17. See also 124 Cong. Rec. 38131 (Oct. 14, 1978) (Rep. Hughes); *id.* at 38134 (Rep. Leggett); *id.* at 38156 (Rep. Buchanan). The beneficiaries of this provision were "persons living in such areas," *id.* at 38127 (Rep. Buchanan), who might be affected by such designations and whose economic interests should be considered when critical habitat is designated. Thus, Congress, in adopting requirements for designating critical habitats, specifically intended to benefit people like petitioners who were adversely affected by such designations.

Section 7 of the ESA, in requiring the Secretary to use the "best scientific data" in determining whether to list endangered species, also includes the petitioners' interests within its protective ambit. The original ESA legislation, adopted in 1973, required listing decisions under section 4 to be based upon the "best scientific . . . data." Pub.L. 93-205, § 4(b), 87 Stat. 887. The 1978 amendments added more detailed procedures for section 7 consultations, including a "best scientific data" requirement whenever the Secretary triggered section 7 consultation by advising a federal agency that listed species were present in the area of a proposed federal project. See Pub.L. 95-632, § 3; 92 Stat. 3753. The 1978 amendments also added a "best scientific data" requirement to the section 4 critical habitat designation process. See Pub.L. 95-632, §§ 11(4), 11(7); 92 Stat. 3765, 3766. The legislative history shows that these "best scientific data"

requirements were intended to protect economic interests from species protective actions that did not have a sound scientific basis. Numerous legislators described episodes where species protective actions were not scientifically justified.⁹ Regardless of the accuracy of these environmental "horror stories," they demonstrate that the "best scientific data" requirement was intended to protect people like petitioners from species-protective actions that were based on ideological or policy preference, not good science.

The 1979 ESA amendments divided section 7(a) into three subsections and added to section 7(a)(2) the current ESA language, which provides that "[i]n fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available." See Pub. L. 96-159, § 4(1), 93 Stat. 1226. This language was part of a package of amendments offered by Representative Breaux. 125 Cong. Rec. 28940-28941 (1979). These amendments were apparently prompted by a General Accounting Office (GAO) report which, according to Representative Bauman, "found that further legislative changes to the Endangered Species Act are needed to better balance species protection and economic growth and development." *Id.* at 28941. One of the

9. Representative Lott noted that ESA restrictions had delayed or halted important public works projects, and that one of the "worst abuses" had "occurred in the listing process whereby species of plants and animals have been listed as endangered without even a scintilla of adequate supporting evidence". 124 Cong. Rec. 37115 (1978). Representative Bowen stated that the 1978 bill would ensure "that there can be economic growth and development", because "[f]or the first time, we are going to have proposed final regulations actually based on the best scientific data available -- current, not old data, but current data." *Id.* at 38123. Representative Beard noted how the FWS "is actively considering listing species which are not even threatened or endangered". *Id.* at 38125. Representative Buchanan described a listing decision that he suspected was not based on scientific data but on the "environmental activism" of FWS personnel. *Id.* at 38127. He went on to note that the 1978 legislation "is an attempt to address such problems." *Id.* Senator Wallop also described how the listing of certain alligators in Florida had not been scientifically based: "The agency representatives testified that biologically the alligator never did qualify as endangered, but that its listing as such was an example of emotional rather than biological reason dictating the species to be listed in the first place." *Id.* at 21136.

problems identified in the GAO report was "the failure to utilize the best scientific evidence available." *Id.* at 29050 (Rep. Bowen). House Conference Report 697 also described the GAO's criticism of listing decisions and GAO's conclusion that "if the Fish and Wildlife Service had . . . obtain[ed] adequate information on proposed species, including the development of the latest and best available scientific data as required by the Act, the species may never have been proposed in the first place." H.R. Conf. Rep. 697, 96th Cong., 1st Sess. 10 (1979). Thus, the 1979 legislative history also indicates that the "best scientific data" requirement was intended to benefit those who might otherwise be adversely affected by species-preservation actions that were based on policy preferences rather than good science.

Consequently, petitioners are within the zone of interests encompassed both by the "economic impact" requirement in section 4 and the "best scientific data" requirement in section 7.¹⁰ Because these statutory requirements set limits on the species protection goals of the ESA, they were necessarily intended to be enforced through claims of overregulation brought by persons, such as petitioners, whose economic interests had been adversely affected by noncompliance with these requirements. In this sense, the petitioners are both "regulated" and "protected" by the ESA.¹¹

10. The "best scientific data" requirement was not intended to solely protect economic interests from overzealous and unscientific administration of the ESA. The 1978 legislative history also reveals concern that the FWS was withholding certain scientifically-justified species protective actions for fear that the resulting restrictions on development would provoke a political backlash. See 124 Cong. Rec. 21347 (1978) (Sen. Culver).

11. The policy statement in section 2(c)(2), 16 U.S.C. § 1531(c)(2) that "Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species" was intended to "recognize the individual States' interest and, very often, the regional interest with respect to water allocation." S. Rep. 418, 97th Cong., 2d Sess. 25 (1982). Consequently, even if this policy statement did not change any substantive or procedural requirements of the ESA, *id.*, it does give special statutory recognition to the particular interest in water allocation at issue in this case. It is hard to see how such an interest can be excluded from the zone of interests encompassed by the ESA when the statute itself

II. PETITIONERS HAVE STANDING UNDER THE CITIZEN SUIT PROVISION OF THE ENDANGERED SPECIES ACT

The zone of interests test was developed as a gloss on section 10 of the APA. *Clarke, supra*, 479 U.S. at 395, 400 n. 16. This Court has not determined whether the "zone" test applies to other statutes authorizing judicial review. *Id.* at 400 n. 16. Congress clearly has the power, however, to abrogate all prudential limitations on standing, and thus to expand standing to the full extent permitted by Article III of the Constitution. *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, ___ U.S. ___, 1996 USLW 241649 (May 13, 1996); *Gollust v. Mendell*, 501 U.S. 115, 126 (1991); *Gladstone Realtors, supra*, 441 U.S. at 100; *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

Clearly the citizen suit provision of the ESA significantly broadens the right of persons to challenge agency decisions under that act. Under that provision, "any person may commence a civil action on his own behalf . . . (A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . , who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; . . ." 16 U.S.C. § 1540(g)(1). Read literally, the provision would authorize "any person" to challenge any agency "violation," regardless of whether the person has sustained actual injury or met other constitutional standing requirements. This Court has held, however, that Congress cannot abrogate the constitutional standing requirements contained in Article III. *Gladstone, supra*, 441 U.S. at 100. Therefore, notwithstanding the broad language of the citizen suit provision, any person challenging agency action under that provision must still satisfy Article III standing requirements.

On its face, the citizen suit provision, by authorizing actions by "any person" who asserts a violation of the ESA, appears to abrogate prudential standing requirements altogether in actions challenging agency action under the ESA. Thus, the provision

accords the interest in water allocation special recognition.

appears to authorize actions regardless of whether the plaintiff's interests fall within the "zone of interests" protected or regulated by the ESA, assuming of course that the plaintiff otherwise meets Article III standing requirements. The reference to "any person" suggests a congressional intent to broaden standing requirements to the constitutional limits authorized by Article III. Certainly nothing in the legislative history of the citizen suit provision suggests an intent to limit the standing of persons to maintain actions under that act.^{12/} Moreover, in concluding that other statutes expanded standing to the full constitutional limit, the Court has relied mainly on the plain language of the statute in reaching its conclusion. See *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 209 (1972) (construing "person aggrieved" in the Fair Housing Act, noting "[t]he language of the Act is broad and inclusive"); *Gladstone, Realtors, supra*, 441 U.S. at 103 (section 812 of the Fair Housing Act "on its face contains no particular statutory restrictions on potential plaintiffs"); *Gollust v. Mendell*, 501 U.S. 115, 122 (1991) ("the statutory definitions identifying the class of plaintiffs . . . who may bring suit indicate that Congress intended to grant enforcement standing of considerable breadth.") (emphases added). Because statutes should be read in accordance with their plain meaning, see e.g., *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989), the citizen suit provision of the

12. Section 11(g)(1)(A) and (B), 16 U.S.C. §§ 1540(g)(1)(A) and (B) were enacted as part of the original 1973 ESA legislation. See Pub. L. 93-205, § 11(g)(1)(A), (B), 87 Stat. 900. Senate Report 307, 93rd Cong., 1st Sess. 11 (1973), simply said that the citizen suit provision permits "private actions to enforce the provisions of this Act." See also 119 Cong. Rec. 25676 (1973) (Sen. Williams) (commenting that "[c]itizen suits are also permitted subject to certain conditions"); H.R. Rep. 1625, *supra*, at 7 ("In addition [to] the civil and criminal penalty provisions provided already discussed, the act authorizes any person, private entity, as well as any State or Federal agency to bring suit to enjoin violations of the act."). Section 11(g)(1)(C), 16 U.S.C. § 1540(g)(1)(C), was added in the 1982 ESA amendments. See Pub.L. 97-304, § 7(2), 96 Stat. 1425. See also H.R. Conf. Rep. 835, 97th Cong., 2d Sess. 35 (1982).

ESA would appear to abrogate prudential standing requirements altogether for all plaintiffs.^{13/}

To be sure, the legislative history of the citizen suit provision of the Clean Water Act (CWA) suggests a primary congressional concern to broaden access to the courts for those seeking to promote the environmental goals of the CWA. Senator Muskie, the principal sponsor of the CWA, described this purpose in the following colloquy:

"Mr. Bayh. Would an interest in a clean environment--which would be invaded by a violation of the Federal Water Pollution Control Act or a permit thereunder--be an 'interest' for the purposes of this section?

"Mr. Muskie. That is the intent of the conference The conference report states: 'It is the understanding of the conferees that the conference substitute relating to the definition of the term 'citizen' reflects the decision of the U. S. Supreme Court in the case of *Sierra Club v. Morton* ([405 U.S. 727 [92 S.Ct. 1361, 31 L.Ed.2d 636] (1972)]).' . . . It is clear that under the language agreed to by the conference, a noneconomic interest in the environment, in

13. The legislative history of citizen suit provisions in other environmental statutes indicates an intent to eliminate all prudential standing restrictions. For example, in describing the citizen suit provision in the Surface Mining Control and Reclamation Act, 30 U.S.C. section 1270, the House Report noted: "It is the intent of the committee that the phrase 'any person having an interest which is or may be adversely affected' shall be construed to be coterminous with the broadest standing requirements enunciated by the U.S. Supreme Court." H.R. Rep. 218, 95th Cong., 1st Sess. 90 (1977) (emphasis added). The Senate Conference Report on the Clean Water Act also described the scope of the citizen suit provision as follows: "It is the understanding of the conferees that the conference substitute relating to the definition of the term 'citizen' reflects the decision of the U.S. Supreme Court in the case of *Sierra Club v. Morton* [405 U.S. 727 (1972)]". S. Conf. Rep. 1236, 92d Cong., 2d Sess., 146 (1972). Since *Sierra Club* dealt with the constitutional requirement of injury-in-fact, Congress apparently intended citizen suit standing under the Clean Water Act to be as broad as was constitutionally permissible.

clean water, is a sufficient base for a citizen suit under section 505.

"Further, every citizen of the United States has a legitimate and established interest in the use and quality of the navigable waters of the United States. Thus, I would presume that a citizen of the United States, regardless of residence, would have an interest as defined in this bill regardless of the location of the waterway and regardless of the issue involved."

"*Mr. Bayh.* I thank my good friend from Maine. I believe that the conference provision will not prevent any person or group with a legitimate concern about water quality from bringing suit against those who violate the act or a permit, or against the Administrator if he fails to perform a nondiscretionary act. These sorts of citizen suits--in which a citizen can obtain an injunction but cannot obtain money damages for himself--are a very useful additional tool in enforcing environmental protection laws. I am glad to see that authority for such suits is included in this bill." 118 Cong. Rec. 33717 (1972) (emphasis added).

Thus, the legislative history of the CWA makes clear that the citizen suit provision was intended to eliminate prudential standing requirements for litigants who pursue environmental interests. It is less clear, however, whether Congress intended to similarly eliminate prudential standing requirements for parties who assert economic interests that are in competition with these environmental interests.

The better view, the amici states believe, is that the citizen suit provision of the ESA abrogated prudential standing requirements for all parties who challenge agency action under the ESA, regardless of whether they seek to further environmental goals or not. The statutory language--which affords a cause of action for "any person" who asserts a violation of the statute--is generally a more reliable indicator of the congressional intent than the legislative history. Moreover, even assuming that the legislative history of the CWA is relevant to the ESA, the legislative history indicates only that Congress meant to broaden standing for those who pursue environmental goals, and does not indicate that Congress did not mean to broaden standing for those who pursue economic or other

goals.¹⁴ Therefore, the petitioners are authorized to maintain their action under the citizen suit provision.

Whether or not the citizen suit provision of the ESA abrogates prudential standing requirements for persons who pursue economic rather than environmental interests, the provision clearly does not reduce the standing that such persons might have under other statutory authority to challenge such agency action. Therefore, if a person has standing to challenge agency action under section 10 of the APA, the action can be maintained regardless of whether the person has standing under the citizen suit provision. Nothing in the citizen suit provision suggests an intent to preclude actions that might otherwise be permissible under section 10 of the APA. On the contrary, the citizen suit provision expressly provides that "[t]he injunctive relief provided by this subsection shall not restrict any right which any person . . . may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Secretary or a State agency)." 16 U.S.C. § 1540(g)(5). Also, section 12 of the APA, 5 U.S.C. § 559, provides that subsequent legislation shall not supersede or modify the right of review granted by section 10 of the APA unless the language in a subsequent statute "expressly" so provides. *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955). Thus, although the citizen suit provision expands standing by authorizing actions by some persons who may fail to meet the prudential requirements of the APA, the provision does not reduce standing by precluding actions by persons who otherwise meet these prudential requirements. As we have explained, the petitioners in this case satisfy the prudential standing requirements of the APA. Hence, they are authorized to maintain their action regardless of whether they have standing under the citizen suit provision.

14. For example, Congress thought that the citizen suit provision of the Resource Conservation and Recovery Act would be available to police agency overregulation as well as underregulation. See H.R. Rep. 1491(I), 94th Cong., 2d Sess. 26 (1976) ("It is the Committee's view that the[re] is sufficient public input and this coupled with the citizen suit provisions contained in section 702, and the section permitting petitions for new regulations provide sufficient protection from both overzealous or lax regulation.") (emphasis added).

Additionally, whether or not the citizen suit provision abrogates prudential standing requirements for persons pursuing economic rather than environmental interests, the provision nonetheless affords a remedy for such persons if they are able to meeting prudential standing requirements. To conclude otherwise would be to wholly disregard the statutory language affording a remedy for "any person" who asserts a "violation" of the act. Therefore, a person who meets prudential standing requirements has a remedy under the citizen suit provision, regardless of the interests that are being asserted. As explained above, the petitioners in this case meet prudential standing requirements, and thus are authorized to maintain an action under the citizen suit provision under any circumstances.

This analysis is consistent with the historical development of regulation and standing principles. The first forms of regulation were largely economic: regulation of railroads and transportation by the Interstate Commerce Commission; economic regulation of banks, securities, communications during the New Deal era; and the like. Regulation of "non-economic" interests, such as protection of the environment and of health and safety, appeared much later, in the 1960s and thereafter. Consequently, traditional standing principles, as applied to economic interests adversely affected by regulation, were developed in the earlier era. See *Sierra Club v. Morton*, *supra*, 405 U.S. at 733 ("Palpable economic injuries have long been recognized as sufficient to lay the basis for standing, with or without a specific statutory provision for judicial review."). The advent of environmental regulation gave rise to conceptual questions regarding the standing of parties who assert non-economic values and interests. *Sierra Club* partially answered the question by broadening access to courts for environmental plaintiffs who are able to assert "injury-in-fact." Thereafter, Congress often included citizen suit provisions in environmental statutes, such as the CWA and the ESA, to ensure that plaintiffs who satisfied the *Sierra Club* standard would have standing to promote Congress' environmental goals and policies. This occurred, however, against a backdrop of well-established standing principles that had been applied to economic interests adversely affected by government regulation. In enacting citizen suit provisions, Congress intended to broaden judicial access for parties who assert environmental interests, but

did not intend to eliminate or otherwise restrict standing for parties who assert economic interests. In short, the congressional intent was to let "non-economic" or "environmental" plaintiffs into the standing club, not throw economic interests out of the club.^{15/}

15. In support of its decision, the Ninth Circuit below cited its earlier decision in *Gonzales v. Gorsuch*, 688 F.2d 1263 (9th Cir. 1982), authored by then-Judge Kennedy. There, the court, although holding that the plaintiff lacked constitutional standing under Article III, stated that the citizen suit provision of the CWA "was intended to grant standing to a nationwide class, comprised of citizens who alleged an interest in clean water." 688 F.2d at 1266. Thus, although the court stated that the citizen suit provision affords standing for those seeking to pursue environmental goals, the court did not suggest that the provision precludes standing for other litigants pursuing economic interests. Thus, *Gonzales* does not contradict our argument that the citizen suit provision affords standing to such litigants.

The Ninth Circuit also cited its earlier decision in *Dan Caputo Co. v. Russian River County Sanitation, et al.*, 749 F.2d 571 (9th Cir. 1984), signed by then-Judge Kennedy. There, the Ninth Circuit held that a plaintiff who had failed to submit a bid for a contract to build a sewage treatment facility did not have standing under the citizen suit provision of the CWA to challenge decisions of the EPA and the State of California awarding the construction contract to another contractor. In our view, the court erred in holding that the plaintiff contractor could not maintain his action under the citizen suit provision because he did not meet prudential standing requirements, although, to be sure, the State of California argued that the plaintiff contractor lacked standing under the citizen suit provision. As we acknowledged above, however, the question whether prudential standing requirements are abrogated for persons who assert economic interests is a close one and is not free from doubt. In any event, the plaintiff contractor in *Russian River* could not maintain his action under section 10 of the APA because he did not meet prudential standing requirements, and is thus distinguished from the petitioners here, who meet prudential standing requirements and thus are authorized to maintain an action under section 10.

CONCLUSION

The Ninth Circuit's judgment should be reversed.

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**In the
Supreme Court of the United States**

OCTOBER TERM, 1995

BRAD BENNETT, et al., Petitioners

v.

MARVIN PLENERT, et al., Respondents

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

**BRIEF OF THE AMERICAN FARM BUREAU
FEDERATION, CALIFORNIA FARM BUREAU,
IDAHO FARM BUREAU, TEXAS FARM BUREAU,
AND OREGON FARM BUREAU
AS AMICI CURIAE IN SUPPORT OF PETITIONERS**

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QUESTION PRESENTED

Whether private landowners are within the "zone of interests" of the Endangered Species Act and thus have standing to challenge the government's failure to adhere to that statute's enforcement standards and procedures.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
INTERESTS OF THE AMICI CURIAE	1
ARGUMENT	2
I. FARMERS AND RANCHERS ARE WELL WITH- IN THE ZONE OF INTERESTS OF THE ESA .	3
A. Farmers And Ranchers Are Regulated By The ESA And Hence Are Within Its Zone Of Interests	3
B. The ESA Provides Procedural Protections Against Needless Economic Harm To Private Landowners	5
C. Farmers And Ranchers Must Have Standing If The ESA's Procedural Limits Are To Be Enforced	9
D. The Court Of Appeals' Motivation Test For Standing Would Abrogate An Important Check On Governmental Misconduct	10
E. The Decision Below Was A Premature And Partisan Ruling On The Merits	13
F. The Impact Of The Decision Below Extends Well Beyond The ESA Provisions At Issue Here	14

TABLE OF CONTENTS—Continued

	Page
II. THE COURT OF APPEALS' DENIAL OF STANDING VIOLATES SEPARATION OF POWERS	15
CONCLUSION	17

TABLE OF AUTHORITIES

Cases:	Page
<i>Air Courier Conf. v. APWU</i> , 498 U.S. 517 (1991) . . .	5
<i>Arnold Tours, Inc. v. Camp</i> , 400 U.S. 45 (1970) . .	5, 7
<i>Association of Data Processing Serv. Orgs. v. Camp</i> , 397 U.S. 150 (1970)	3, 5, 7, 10, 15
<i>Babbitt v. Sweet Home Chapter of Communities for a Great Or.</i> , 115 S. Ct. 2407 (1995)	4, 8, 9
<i>Barlow v. Collins</i> , 397 U.S. 159 (1970)	8
<i>Christy v. Lujan</i> , 490 U.S. 1114 (1989)	12
<i>Clarke v. Securities Indus. Ass'n</i> , 479 U.S. 388 (1987)	<i>passim</i>
<i>FCC v. Sanders Bros. Radio Station</i> , 309 U.S. 470 (1940)	10
<i>Gladstone Realtors v. Village of Bellwood</i> , 441 U.S. 91 (1979)	9, 16
<i>Idaho Farm Bureau Fed'n v. Babbitt</i> , 900 F. Supp. 1349 (D. Idaho 1995)	2, 4, 10, 14, 15
<i>Investment Co. Inst. v. Camp</i> , 401 U.S. 617 (1971)	5, 13
<i>Mausolf v. Babbitt</i> , 913 F. Supp. 1334 (D. Minn. 1996)	11, 12
<i>Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n</i> , 453 U.S. 1 (1981)	16

TABLE OF AUTHORITIES—Continued

	Page
<i>Schering Corp. v. FDA</i> , 51 F.3d 390 (3d Cir.), cert. denied, 116 S. Ct. 274 (1995)	10
<i>Swan View Coalition, Inc. v. Turner</i> , 824 F. Supp. 923 (D. Mont. 1992)	16
<i>Tennessee Valley Auth. v. Hill</i> , 437 U.S. 153 (1978) . .	7
Statutes:	
16 U.S.C. § 1533	5, 6
16 U.S.C. § 1536	5, 6, 9
16 U.S.C. § 1540	3, 16
Miscellaneous:	
Albert, <i>Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief</i> , 83 Yale L.J. 425 (1974)	13
124 Cong. Rec. 38134 (1978)	6
Fletcher, <i>The Structure of Standing</i> , 98 Yale L.J. 221 (1988)	17
Jaffe, <i>The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff</i> , 116 U. Pa. L. Rev. 1033 (1968)	16

TABLE OF AUTHORITIES—Continued

	Page
Ring & Behrend, <i>Using Plaintiff Motivation to Limit Standing: An Inappropriate Attempt to Short-Circuit Environmental Citizen Suits</i> , 8 J. Envtl. L. & Litig. 345 (1994)	12
Scalia, <i>The Doctrine of Standing as an Essential Element of the Separation of Powers</i> , 17 Suffolk U. L. Rev. 881 (1983)	15
Sunstein, <i>What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III</i> , 91 Mich. L. Rev. 163 (1992)	17
United States Fish & Wildlife Service, <i>An Ecosystem Approach to Fish and Wildlife Conservation</i> (1995)	8

INTERESTS OF THE AMICI CURIAE*

The American Farm Bureau Federation ("AFBF") is a voluntary general farm organization organized in 1920 under the General Not-For-Profit Corporation Act of the State of Illinois. AFBF was founded to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. AFBF has member organizations in all 50 states and Puerto Rico representing more than 4.4 million members and their families. Amici California, Idaho, Oregon, and Texas Farm Bureaus are constituent members of AFBF, representing the interests of farmers and ranchers in their respective states.¹

The AFBF and state Farm Bureau amici have a direct interest in the outcome of this case. Their farmer and rancher members own or lease significant amounts of property, on which they depend for their livelihoods and upon which all Americans rely for food and other basic necessities. Amici's members' use and enjoyment of their land has often been restricted by application of the Endangered Species Act ("ESA" or "Act"). The decision below denies amici and their members the right to bring judicial challenges to such restrictions, even where an agency flagrantly violates express provisions of the ESA. In consequence, amici have a strong interest in reversing the Ninth Circuit's ruling that farmers and ranchers who have been harmed by the U.S. Fish and Wildlife Service's ("FWS"'s) perverse application of the ESA have no standing to bring a judicial challenge.

We believe that amici's experience in litigating ESA issues will be helpful to this Court in reaching a decision. For example, the AFBF and Idaho Farm Bureaus have

* The consents of the parties to the filing of this amicus brief are on file with the Clerk.

¹ Texas Farm Bureau has additionally endorsed the *amicus curiae* brief in support of petitioner filed by the State of Texas in this case.

recently appealed to the Ninth Circuit a decision by a district court in Idaho that—based on the Ninth Circuit’s ruling in this case—denied them standing to challenge the government’s listing of five species of Snake River snails as endangered or threatened. See *Idaho Farm Bureau Fed’n v. Babbitt*, 900 F. Supp. 1349, 1360 (D. Idaho 1995) (“*Five Snails Case*”).

In the *Five Snails Case*, the Farm Bureau plaintiffs allege that FWS failed to follow procedures and apply standards mandated by the ESA, including the requirement that FWS use the “best scientific and commercial data available” in making a listing decision. 16 U.S.C. § 1533(b)(2). As a result, plaintiffs contend, they were denied access to river waters for recreational and agricultural use and restricted in the type of agricultural practices they could employ. The district court, relying heavily on the Court of Appeals’ opinion in this case, held that the plaintiffs lacked standing because their injuries did not fall within the zone of interests of the ESA. 900 F. Supp. at 1360.

On appeal in the *Five Snails Case*, the Farm Bureau plaintiffs argue that the zone of interests test does not apply to their situation because they were directly regulated by the ESA and the FWS’s listings. In the alternative, plaintiffs contend that even if the zone of interests test does apply, they satisfied its requirements by showing that they had been and would continue to be indirectly regulated by the snail listings. The *Five Snails Case* illustrates one common and concrete way in which the ESA harms farmers and ranchers. If standing is denied them in such cases on the basis of *Bennett*, Farm Bureau members will be denied any significant avenue of relief against regulatory excesses in the ESA listing process.

ARGUMENT

Amici agree with Petitioners that the zone of interests test is not applicable where Congress has expressly made

standing coterminous with the reach of Article III by enacting a broad citizen suit provision like that in the ESA, 16 U.S.C. § 1540(g)(1). Our purpose in this brief, however, is to show that *if* the Court finds the zone of interests test applicable to this proceeding, the text, structure, and purposes of the ESA, as well as this Court’s precedents, mandate that farmers and ranchers injured by government failure to adhere to the ESA’s procedures and standards are within the ESA’s zone of interests and have standing to seek redress.

I. FARMERS AND RANCHERS ARE WELL WITHIN THE ZONE OF INTERESTS OF THE ESA

The Court of Appeals banished farmers and ranchers from the zone of interests of the Endangered Species Act. But this Court has held that persons have standing to challenge government action that has caused them injury, provided there is a “plausible relationship” between the injured party’s interests and the policies incorporated in “the overall context” of the statute at issue. *Clarke v. Securities Indus. Ass’n*, 479 U.S. 388, 401-403 (1987). The policies embodied in the ESA require government agencies both to protect endangered species and, in the course of doing so, to weigh the impact of species-protection measures on private landowners. Thus, the relationship between the interests of the plaintiffs in this case and the purposes of the ESA is more than the “plausible” link demanded in *Clarke*; the plaintiffs *must* have their day in court if the balancing process contemplated by the ESA is to take place at all.

A. Farmers And Ranchers Are Regulated By The ESA And Hence Are Within Its Zone Of Interests

It is well-established that injured persons who are “‘regulated by the statute * * * in question’” are within its zone of interests. *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970) (“*ADAPSO*”). Farmers and ranchers typically satisfy this test. No one, for example, is more heavily impacted by FWS’s disregard for the

standards imposed by the ESA in the preparation of biological opinions than the rancher plaintiffs in this case. Plaintiffs will have less water available for irrigation and recreation, which will determine how they can use their land. Though this form of regulation may be indirect, it is regulation nonetheless. It ignores the realities of the situation to maintain, as did the Court of Appeals (63 F.3d at 917 n.2), that the government's actions here regulate only itself and not the plaintiff ranchers.

Another example of how the ESA regulates farmers and ranchers is the "take" prohibitions of the Act. Once a species is listed, these prohibitions apply automatically. They often limit or prevent the most routine agricultural activities, from clearing land to plowing fields. See *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 115 S. Ct. 2407 (1995). It is pure fiction to pretend that listing decisions do not regulate the conduct of farmers and ranchers. See *Five Snails Case*, *supra*.

Farmers and ranchers are impacted by the ESA so immediately and to such a great extent that they are effectively regulated by the statute and are obviously within its zone of interests. But even if this were not the case, there can be no doubt that Congress envisioned that procedural constraints on FWS would benefit landowners and intended that they have standing to enforce those limits. Farmers' and ranchers' activities would fall outside the ESA's zone of interests only if their interests were so "marginally related" to the statutory scheme that Congress reasonably could not have intended to permit them to enforce the relevant provisions of the Act. *Clarke*, 479 U.S. at 399. This test for standing is not "especially demanding"; in fact, there need

be "no indication of congressional purpose to benefit the would-be plaintiff" at all. *Id.* at 399-400.²

B. The ESA Provides Procedural Protections Against Needless Economic Harm To Private Landowners

Congress sought to protect property owners against unreasonable and overbroad regulation under the ESA by requiring responsible agencies to factor the economic impact of species-protection proposals into their decision-making.

The ESA requires that any action taken by government agencies to protect endangered species be "reasonable and prudent" (16 U.S.C. § 1536(b)(3)(A)), that agencies "tak[e] into consideration the economic impact" of their action in a balancing process that weighs the respective benefits of acting or not acting (§ 1533(b)(2)), and that they rely on the "best scientific and commercial data available" (§ 1536(a)(2)). The natural and ordinary meaning of these provisions is that Congress intended that ESA enforcement should be as aggressive as necessary to prevent species

² Even if the rancher plaintiffs were not subject to ESA regulation, they should have standing as economic competitors of the endangered fish and their champions. Indeed, the Court of Appeals justified its denial of standing based on the plaintiffs' "competing interest" with the suckers. 63 F.3d at 921. This Court often has granted standing to the economic competitors of regulated parties. *E.g.*, *Clarke*, 479 U.S. at 409 (trade association representing securities entities had standing under statute regulating banks); *Air Courier Conf. v. APWU*, 498 U.S. 517, 529 (1991) ("competitors of regulated entities have standing to challenge regulations"); see also *ADAPSO*, 397 U.S. at 156; *Arnold Tours, Inc. v. Camp*, 400 U.S. 45, 46 (1970); *Investment Co. Inst. v. Camp*, 401 U.S. 617, 620-621 (1971).

extinction but not more so, and that enforcing agencies should minimize any detrimental economic impact of species protection on property owners. In determining whether the zone of interests test is satisfied, courts properly consider the "overall purposes" of the statute in question and are not limited to consideration of any particular statutory section. *Clarke*, 479 U.S. at 401. Although the "economic impact" consideration is required specifically for designations of critical habitat (§ 1533(b)(2)), it reaches more widely and clearly reflects one of the "overall purposes" of the ESA.

For one example, it is impossible to conceive how an agency decision can satisfy the § 1536(b)(3)(A) requirement that it be "reasonable and prudent" if that decision was reached without taking into account its likely economic impact. Economic consequences *always* inform a reasonable and prudent decision. For another, the statute specifically requires "consideration of the economic impact of * * * designating critical habitat" (124 Cong. Rec. 38134 (1978) (Statement of Rep. Leggett)), including "revisions" to and "exclusion[s]" from habitat designation. § 1533(b)(2). Properly interpreted, the ESA demands that economic interests be taken into account at every stage of the species protection process.

Other provisions of the ESA likewise indicate a congressional purpose to require that agencies balance the interests of landowners, broadly conceived, against the goal of species protection. For example, the Act's requirement that an agency conduct a hearing on a listing proposal, if requested (§ 1533(b)(5)(E)), creates a forum in which competing interests can be aired. But farmers' and ranchers' ability to demand a hearing and make statements on a listing proposal would be meaningless if they were denied standing to challenge the agency's unreasoned and arbitrary rejection of their views. Other provisions too—such as notice and comment requirements more demanding than those imposed by the Administrative Procedure Act—would be otiose if

Congress' *sole* concern were to protect endangered species; they show that a more balanced approach was intended.³

Plaintiffs allege that in preparing its biological opinion on how to protect two endangered species of suckers, FWS failed accurately to assess and balance the competing interests at stake. As a result, FWS developed an unreasonable and imprudent plan to save the fish, requiring substantially higher-than-necessary water levels in the Klamath reservoirs and thereby inflicting substantial harm on local property owners like plaintiffs who depend on that water for irrigation and other purposes. Because the solution proposed by FWS and adopted by the Bureau of Reclamation goes far beyond what was necessary to save the fish, plaintiffs allege, respondents acted unlawfully and should be restrained.

The ESA contemplates the possibility that agencies will adopt overbroad species protection measures of the type alleged by plaintiffs. The Act incorporates standards to guard against this overreaching. Plaintiffs allege a violation of those standards and seek to restore agency consideration of the full array of interests contemplated by Congress. The Court of Appeals would bar them from doing so.

That Congress did not specifically identify farmers and ranchers as beneficiaries of the ESA is of no moment. This Court in *Clarke* recognized that classes of persons not specifically mentioned in a statute nevertheless often fall within its zone of interests and have standing. 479 U.S. at 395-396 & n.10 (citing *ADAPSO*, 397 U.S. 150, and *Arnold*

³ For all these reasons, amici urge this Court to reconsider its dictum in *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978), that Congress intended to authorize species-protection measures "whatever the cost." It is very doubtful, given the plain language and structure of the statute, that *any* agency decision concerning species protection may be made without first employing cost-benefit analysis.

Tours, Inc. v. Camp, 400 U.S. 45 (1970)). Here, concern for the interests of farmers and ranchers—parties whose interests are inevitably and obviously affected by the ESA restrictions—is “[i]mplicit in the statutory provisions,” and thus their very concrete and substantial injuries fall within the statute’s “zone of interests.” *Barlow v. Collins*, 397 U.S. 159, 164 (1970); see also *Sweet Home*, 115 S. Ct. at 2410 (assuming without discussion that landowners and logging companies had standing to challenge regulations promulgated under the ESA).

The Congressional mandate that agencies identify and weigh economic and other interests when considering species-protection measures is both eminently reasonable and completely consistent with contemporary thinking regarding the interrelated issues of protecting the environment and promoting agricultural production. Farmers and ranchers are central players in the ecosystem that the ESA seeks to protect. They have long prided themselves on being stewards of the land. Indeed, it is through their dedication to scientific conservation methods and willingness to develop and embrace new technology that the United States is able to produce, on about 300 million acres of crop land, food and other essentials that would otherwise require setting aside a billion or more acres for farming. The efforts of the farming and ranching community have thus freed some 700 million acres for other uses, including species conservation.

The FWS itself has recognized that the ESA mandates this mutually reinforcing approach, defining its own responsibility under the ESA as “protecting or restoring the function, structure, and species composition of an ecosystem *while providing for its sustainable socioeconomic use*,” and including as its “partners” in that effort “*corporate and individual landowners*.” United States Fish & Wildlife Service, *An Ecosystem Approach to Fish and Wildlife Conservation* (1995) (emphasis added). By requiring that the government’s species protection efforts be “reasonable and

prudent” and take account of “economic impact[s],” the ESA contemplates a lasting and healthy relationship between the humans and animals who share the land—not the single-minded pursuit of species protection at any cost.

Agency regulation that fails to take full account of economic and other consequences upsets the balanced relationship between agricultural production and species protection, and thus runs afoul of this broad statutory purpose. Justice O’Connor, concurring in *Sweet Home*, recognized that FWS, in the course of enforcing the ESA, might well engage in just such “questionable applications” of its regulations. 115 S. Ct. at 2421. Plaintiffs’ suit—claiming that the government swept aside the balancing of landowners’ and species protection interests required by the ESA in the interagency consultation process—*strengthens* the species protection program enacted by Congress by inviting judicial correction of “questionable applications.” The decision below deprives plaintiffs of the ability to enforce the very part of the Act designed to protect their interests.

C. Farmers And Ranchers Must Have Standing If The ESA’s Procedural Limits Are To Be Enforced

It would make no sense to impose a requirement that species protection be “reasonable and prudent” (16 U.S.C. § 1536(b)(3)(A)) if no one had standing to challenge unreasonable and imprudent agency action. By denying the plaintiffs standing in this case, the Court of Appeals effectively removed overregulation by the challenged agencies from *any* judicial oversight. Such an extreme position not only defies common sense, but also conflicts with the well-established principle that injury resulting from a regulatory agency’s failure to abide by required procedures is more than sufficient to confer standing. *E.g.*, *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 103-104 (1979) (complainants had standing where they were “dissatisfied with the * * * delays” resulting from HUD’s procedural irregularities).

Because farmers and ranchers are regulated and economically impacted by the ESA, and because their property houses so many listed species, farmers and ranchers are "reasonable candidates" (*Clarke*, 479 U.S. at 403) to serve as "reliable private attorney[s] general" (*ADAPSO*, 397 U.S. at 154) to monitor the government's compliance with the Act. In many instances, they may be the *only* class of interested parties with the incentive and information necessary to play such a watchdog role. See *Five Snails Case*, *infra* pp. 14-15. Thus, if farmers and ranchers do not have standing to challenge the government's overregulation, it is unlikely that anyone does, and there will exist no judicial safeguard against a government run amok.

It is essential, then, if FWS and other agencies are to be constrained within statutory limits, that economically affected persons like plaintiffs be accorded standing. See also *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 477 (1940) (granting standing under the Communication Act of 1934 to the only class of persons likely to have "a sufficient interest to bring to the attention of the appellate court errors of law" by the FCC); *Schering Corp. v. FDA*, 51 F.3d 390, 396 (3d Cir. 1995) (pioneer drug manufacturers are "well-positioned" to monitor the FDA regulations at issue because they possess the scientific data "to recognize when the FDA may stray from the legislatively mandated testing requirements"). Otherwise, those statutory limits effectively will be unenforceable.

D. The Court Of Appeals' Motivation Test For Standing Would Abrogate An Important Check On Governmental Misconduct

The Court of Appeals would limit standing under the ESA to plaintiffs with the "correct" motivation. Only those purporting to be motivated by "an interest in the preservation of endangered species" (63 F.3d at 919) would be permitted to challenge governmental misconduct in enforcing the Act. The court below thereby effectively transformed the zone of

interests test from an objective check for a minimal nexus between a plaintiff's interest and the statutory scheme into a subjective inquiry into the plaintiff's motivation.

As one federal district court correctly reasoned in a recent case presenting a similar challenge to standing under the ESA, to deny standing to plaintiffs motivated by their own economic well-being rather than species protection would leave FWS "unrestrained" so long as it "cloaks any of its acts in the laudable robe of endangered and threatened species protection." *Mausolf v. Babbitt*, 913 F. Supp. 1334, 1342 (D. Minn. 1996). And such a blanket exemption from procedural regularity, the court continued, would be "a form of totalitarian virtue [and] foreign to the rule of law." *Ibid.* (holding that snowmobilers had standing to challenge National Park Service's closure of national park areas without following proper notice and comment procedures because "interests other than those asserted on behalf of endangered species also fall within the zone of interests protected by the ESA").

Yet, that is precisely the Court of Appeals' "Catch-22" holding in this case: if the government's regulatory zeal leads it to overstep the constraints imposed upon it by the ESA, the *only* parties able to challenge the government's misconduct would be those with *no* incentive to do so. As a practical matter, *no one* would enforce these important statutory protections. Congress could not have intended such a bizarre result.

To illustrate the implications of the Court of Appeals' rule, suppose that federal agencies closed Grand Canyon or Yellowstone Park on the ground that human visitors threatened the survival of a listed rodent, and did so without following the ESA's required procedures. According to the court below, the affected tourists would have no standing to sue because their interests would be opposed to those promoted by the ESA. Likewise, the ruling below would routinely deny standing to farmers whose livelihoods are

directly and significantly impacted by a regulation designed to protect a listed species, such as the farmer who is told he may not bring an area of land into productive use because it harbors a listed mole, or who may not protect livestock from the ravages of a protected predator. Cf. *Christy v. Lujan*, 490 U.S. 1114, 1115-1116 (1989) (White, J., dissenting).

These hypotheticals may seem far-fetched. But at oral argument in *Mausolf*, counsel for the federal government urged that "there is absolutely no judicial recourse for persons who contend the FWS acts overzealously on behalf of listed species." 913 F. Supp. at 1342 n.13. And, in response to a hypothetical posed by the court (with reference to the national park at issue), the government "asserted that the FWS could *close the entire park to human access* to minimize the possibility of any incidental takes of protected species." *Ibid.* (emphasis added). As the court summed up the government's "remarkable position," such an action would be "immune from challenge, and entirely beyond review, because it benefits, rather than harms, endangered or threatened species." *Ibid.* Congress could not have intended that government regulation roam so unchecked.

To avert such a radical unleashing of governmental power, the zone of interests test for standing has not been—and should not be—treated as a motivation test, as the Court of Appeals would have it. Courts are ill-suited to engage in such an inquiry. A motivation test for standing, moreover, would prevent courts from hearing the variety of positions that the ESA clearly contemplates is to be considered as disputes arise over species protection. It would result in a skewed federal environmental policy reflecting the positions of only certain favored groups espousing only one set of the interests incorporated into the ESA's statutory scheme. See generally Ring & Behrend, *Using Plaintiff Motivation to Limit Standing: An Inappropriate Attempt to Short-Circuit Environmental Citizen Suits*, 8 J. Envtl. L. & Litig. 345, 355 (1994).

E. The Decision Below Was A Premature And Partisan Ruling On The Merits

The Court of Appeals' ruling was, in effect, a premature resolution of the merits of plaintiffs' claims. Standing is a threshold question, not a stand-in for resolution on the merits. But, as one commentator has pointed out, "[c]anvassing the entire statute and legislative background for indicia of protective intent necessarily involve[s] a preliminary examination of the merits and a forecast of the strength of the claims." Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 Yale L.J. 425, 494-495 (1974). Here, plaintiffs' allegation was that FWS failed to prepare its biological opinion in conformity with the ESA's requirements. By denying standing to plaintiffs—the only persons with sufficient injury and incentive to bring a judicial challenge—and thereby totally immunizing FWS's conduct from judicial review, the Court of Appeals effectively ruled that FWS did no wrong (indeed, that it never can do wrong when it extends species protection). Such a ruling was premature because, as this Court explained in *Investment Co.*, so long as Congress "arguably" legislated against the challenged conduct, whether Congress actually did so is "a question for the merits." 401 U.S. at 620. Especially given the procedural posture of this case—a motion to dismiss prior to any discovery—the Court of Appeals should not have short-circuited plaintiffs' opportunity to support their allegations.

The problem is not simply one of timing, but of basic fairness. The Court of Appeals' version of the zone of interests test would transform courts from neutral adjudicators into partisans favoring only one side in environmental adjudication. The absurd implications of reserving standing only for proponents of a certain course of action—in this case only for those asserting a "community of interest [with] the suckers" (63 F.3d at 921)—may be demonstrated with an illustration. Suppose Congress were to pass a statute prohibit-

ing alteration of any building determined to be "a historical treasure." Overzealous regulators ban alteration of homes built before 1960, preventing a homeowner from pursuing a badly needed renovation. Because the homeowner has interests at odds with historic preservation, he or she would not have standing to challenge the ban. A court thus would uphold the overregulation without ever hearing substantive arguments against it.

This Court never intended its zone of interests test—a mere "gloss on the meaning of [APA] § 702" (*Clarke*, 479 U.S. at 400 n.16)—to be wielded as a sword in this manner, vanquishing enemies of whatever point of view a court adopts as politically proper. This Court should restore the zone of interests test to its properly neutral and objective role—helping to ensure that those whose interests Congress required to be considered are granted standing to sue an agency that has ignored that mandate.

F. The Impact Of The Decision Below Extends Well Beyond The ESA Provisions At Issue Here

The Ninth Circuit's niggardly approach to ESA standing is not restricted to the species-protection sections of the ESA at issue in this case. A federal district court in Idaho already has relied on the ruling below to deny standing to farmers and ranchers challenging species-listing decisions by FWS. See *Five Snails Case*, 900 F. Supp. at 1360. The Court of Appeals' rule would quash *all* efforts to constrain ESA enforcement within the confines of the statute.

In the *Five Snails Case*, farmers and ranchers sued to enjoin the FWS's listing of five species of Snake River mollusks as endangered or threatened. The Plaintiffs alleged that the listings threatened both the continued viability of their agricultural operations by denying them use of river waters and their recreational enjoyment of the mollusk habitat. They maintained that in reaching its decisions, FWS ignored procedures and failed to apply standards required by

the ESA. The district court, relying heavily on the *Bennett* opinion, denied the plaintiffs standing because their injuries did not fall within the zone of interests of the ESA. 900 F. Supp. at 1360.

Thus, the distorted and cramped vision of standing advocated by the Court of Appeals already has been extended by one court and is certain, if upheld, to annul the right of injured parties to challenge governmental improprieties in many additional areas of environmental regulation. A proper understanding of the zone of interests test should be restored before the damage done to individual landowners becomes irreparable.

II. THE COURT OF APPEALS' DENIAL OF STANDING VIOLATES SEPARATION OF POWERS

So long as it stays within the limits of Article III, Congress, as the author of the ESA, has the authority to determine ESA standing requirements. See *ADAPSO*, 397 U.S. at 154 ("Congress can, of course, resolve the question one way or another, save as the requirements of Article III dictate otherwise"). Thus, whether plaintiffs have standing to bring this litigation "turns on congressional intent, and all indicators helpful in discerning that intent must be weighed." *Clarke*, 479 U.S. at 400. See also Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 885 (1983) (standing "is largely within the control of Congress").

In enacting the ESA, Congress left no doubt about its intent. Perhaps foreseeing efforts to challenge the standing of private landowners to bring ESA actions, Congress took care to inscribe in the statute the broadest possible standing provision:

"[A]ny person may commence a civil suit on his own behalf * * * to enjoin any person, including the United States and any other governmental instrumentality or agency * * * who is alleged to

be in violation of any provision of this chapter or regulation issued under the authority thereof."

16 U.S.C. § 1540(g)(1)(A). That provision proceeds specifically to authorize "any person" to do exactly what plaintiffs in this case did—sue "the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary." *Id.* § 1540(g)(1)(C). As one commentator explained with regard to such "citizen suit" provisions, they are designed to permit a broad array of parties to "question the procedural regularity" of agency action. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. Pa. L. Rev. 1033, 1044 (1968). That precisely characterizes both Congress' purpose in enacting § 1540 and plaintiffs' allegations in this litigation.

Congress thus has spoken on the issue of plaintiffs' standing. A broad citizen suit provision like that in the ESA represents Congress' charge to courts to be inclusive in the diversity and breadth of interests accorded the right to challenge governmental misconduct. See *Gladstone*, 441 U.S. at 103-104 (a citizen suit provision of the Fair Housing Act "contains no particular statutory restrictions on potential plaintiffs"); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 16-17 (1981) (the citizen suit provision in the Federal Water Pollution Control Act "was intended by Congress to allow suits by [a] broad category of potential plaintiffs"); *Swan View Coalition, Inc. v. Turner*, 824 F. Supp. 923, 928-929 (D. Mont. 1992) (based on the citizen suit provision of the ESA, challengers to the adequacy of a biological opinion prepared by FWS had standing to sue). What Congress has granted, the judiciary may not, without violating separation of powers, take away. The Court of Appeals further violated the principle of separation of powers by slighting Congress' mandate that FWS balance the economic costs and benefits of its species-protection decisions. As Professor Sunstein has commented,

"[a]gency rejection of congressional enactments" that mandate "cost-benefit balancing" is "inconsistent with the system of separation of powers." Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 217-218 (1992).

This separation-of-powers principle underlying the law of standing "prevent[s] the anti-majoritarian federal judiciary from usurping the policy-making functions of the popularly elected branches." Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 222 (1988). The Ninth Circuit panel in this case clearly disagreed with Congress' resolve to grant standing broadly to persons injured by enforcement of the ESA. But such policy determinations, under our system, are the province of the legislature. The Court of Appeals impermissibly overstepped its proper bounds by using a narrowly conceived and hopelessly biased zone-of-interests requirement to thwart Congress' purpose to ensure that affected citizens could serve as a check on excessive regulation in the name of species protection. By reversing the Court of Appeals' unwarranted exercise of judicial power, this Court will give effect to Congress' intent and to the separation of powers embodied in our Constitutional structure.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

BRAD BENNETT, *et al.*,

Petitioners,

v.

MARVIN PLENERT, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

**BRIEF OF AMICI CURIAE
THE WASHINGTON LEGAL FOUNDATION;
U.S. SENATOR DIRK KEMPTHORNE;
U.S. REPRESENTATIVES BILL BAKER,
HELEN CHENOWETH, GERALD B. SOLOMON, AND
RICHARD W. POMBO; ALLIED EDUCATIONAL
FOUNDATION; AND FAIRNESS TO
LAND OWNERS COMMITTEE
IN SUPPORT OF PETITIONERS**

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TABLE OF CONTENTS

	Page
Interests of amici curiae	1
Statement of the case	4
Summary of argument	6
Argument	7
I. Congress intended ESA's citizen suit provision to authorize persons satisfying Article III standing requirements to seek judicial review without regard to the prudential "zone of interests" test of standing	7
II. The plaintiffs' economic and other interests easily satisfy the prudential zone of interests test	12
III. The Ninth Circuit's categorical rule that only those who allege an interest in species preservation have prudential standing would foster irrational and unreviewable decisionmaking under the ESA, contrary to the intent of Congress	16
IV. Plaintiffs meet the "causation" and "redressability" requirements of Article III standing	21
Conclusion	24

TABLE OF AUTHORITIES

Page(s)

Cases:

<i>Association of Data Processing Service Orgs. v. Camp</i> , 397 U.S. 150 (1970)	7, 8, 9, 10, 12
<i>Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon</i> , 115 S. Ct. 2407 (1995)	2, 18
<i>Bennett v. Plenert</i> , 63 F.3d 915 (9th Cir. 1996)	<i>passim</i>
<i>Catron County Bd. of Commissioners v. U.S. Fish and Wildlife Service</i> , 75 F.3d 1429,	15
<i>Clarke v. Securities Industry Ass'n</i> , 479 U.S. 388 (1987)	9, 12
<i>INS v. Cardoza-Fonseca</i> , 480 U.S. 421 (1987)	10
<i>Laguna Greenbelt, Inc. v. United States DOT</i> , 42 F.3d 517 (9th Cir. 1994)	18
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992)	2, 22, 23
<i>Lujan v. National Wildlife Fed'n</i> , 497 U.S. 871 (1990)	2
<i>National Wildlife Federation v. Hodel</i> , 839 F.2d 694 (D.C. Cir. 1988)	21

<i>Sierra Club v. Morton</i> , 405 U.S. 727 (1972)	8, 10
<i>Sweet Home Chapter of Communities for a Greater Oregon v. Babbitt</i> , 115 S. Ct. 2407 (1995)	2, 18
<i>United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.</i> , 64 U.S.L.W. 4330 (U.S. May 13, 1996)	7
<i>Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.</i> , 454 U.S. 464 (1982)	11
<i>Warth v. Seldin</i> , 422 U.S. 490 (1975)	7
Constitution and statutes:	
U.S. Const., Art. III	<i>passim</i>
Administrative Procedure Act, 5 U.S.C. §§ 701 et seq.	4, 9
Clean Air Act, 42 U.S.C. § 7604(a)	15
Clean Water Act, 33 U.S.C. § 1365	8, 15
Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. § 11046(a)	15

Endangered Species Act:

16 U.S.C. § 1531(c)(2)	13
16 U.S.C. § 1532(17)	13
16 U.S.C. § 1532(18)	13
16 U.S.C. § 1533	12
16 U.S.C. § 1533(b)(3)	16
16 U.S.C. § 1535(a)	13
16 U.S.C. § 1536(a)(2)	12
16 U.S.C. § 1536(b)(3)(A)	13
16 U.S.C. § 1538	14
16 U.S.C. § 1540(g)(1)	<i>passim</i>

Marine Protection, Research and Sanctuaries Act,

33 U.S.C. § 1415(g)	15
-------------------------------	----

National Environmental Policy Act,

42 U.S.C. § 4332(C)(2)	4, 15, 23
----------------------------------	-----------

Outer Continental Shelf Lands Act,

43 U.S.C. § 1349	15
----------------------------	----

Safe Drinking Water Act,

42 U.S.C. § 300j-8	15
------------------------------	----

Surface Mining Control and Reclamation Act,

30 U.S.C. § 1270	15
----------------------------	----

Toxic Substances Control Act,

15 U.S.C. § 2619	15
----------------------------	----

Miscellaneous:

S. Conf. Rept. No. 92-1236 <i>reprinted in</i> 1972 U.S.C.C.A.N. 3776	8
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IN THE
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Petitioners,

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Respondents.

On Writ of Certiorari to the
United States Court of Appeals
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BRIEF OF THE WASHINGTON LEGAL
FOUNDATION, *ET AL.*, AS AMICI CURIAE IN
SUPPORT OF THE PETITIONERS

INTERESTS OF AMICI CURIAE

The Washington Legal Foundation ("WLF") is a national non-profit, public interest law and policy center based in Washington, D.C., which is dedicated to supporting the free

enterprise system and promoting the principles of a limited and accountable government. WLF advances its objectives through litigation and participation in administrative proceedings in both state and federal forums, as well as by publishing educational materials through its Legal Studies Division. WLF has appeared in this Court as well as in other state and federal courts as *amicus curiae*, particularly in environmental cases that raise issues relevant to this case. See, e.g., *Babbitt v. Sweet Home Chapter of Communities*, 115 S.Ct. 2407 (1995); *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130 (1992); *Lujan v. National Wildlife Federation*, 110 S.Ct. 3177 (1990).

U. S. Senator Dirk Kempthorne of Idaho is the Chairman of the Subcommittee on Drinking Water, Fisheries, and Wildlife of the Senate Committee on Environment and Public Works.

U.S. Representative Bill Baker is a duly elected Member of Congress from the 10th District of California and is also a member of the Subcommittee on Energy and Environment of the House Science Committee.

U.S. Representative Helen Chenoweth is a duly elected Member of Congress from the 1st District of Idaho and is also a member of the Subcommittees on National Parks, Forests, and Lands; Energy and Mineral Resources; and Water and Power Resources, all of the House Committee on Resources.

U.S. Representative Gerald B. Solomon is a duly elected Member of Congress from the 22d District of New York and is Chairman of the House Committee on Rules.

U.S. Representative Richard W. Pombo is a duly elected Member of Congress from the 11th District of California and is a

member of Subcommittees on National Parks, Forests, and Lands and Water and Power Resources of the House Resources Committee; is a member of several subcommittees of the House Agriculture Committee; and is Chairman of the Resources Committee Task Force on Endangered Species.

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including law and public policy, and has appeared before this Court as *amicus curiae* in numerous cases along with WLF.

The Fairness to Land Owners Committee (FLOC) is a national grassroots private property group headquartered in Cambridge, Maryland. FLOC represents over 18,000 "mom and pop" members who are private property owners faced with confiscatory federal, state, and local land-use laws and regulations involving wetlands, endangered species, growth management, and other concerns.

FLOC is dedicated to protecting property rights, especially the right to the prudent use of one's land. FLOC is active in promoting balanced, fair, and environmentally sensitive legislation that protects property rights. FLOC's public education campaign emphasizes the difference between conservation and confiscation, and its officers and members have testified on numerous occasions before the Congress and state legislatures.

All amici believe that the Ninth Circuit's decision denying standing to petitioners to seek judicial review under the Endangered Species Act was wrongly decided and contrary to the intent of Congress.

STATEMENT OF THE CASE

In the interests of judicial economy, amici adopt by reference the Statement of Facts in petitioners' brief. This case involves two reservoirs in the federal government's Klamath Project in Oregon administered by the Bureau of Reclamation. The U.S. Fish and Wildlife Service (FWS) prepared a Biological Opinion recommending maintaining a minimum lake level to protect two species of fish, the effect of which was to designate critical habitat for the fish. The Bureau accepted the FWS recommendation.

Plaintiffs, two Oregon ranch operators and two irrigation districts that use water from the reservoirs, and who are directly affected by the reduced supply of water, filed suit under the citizen suit provision of the ESA, seeking to challenge the FWS Biological Opinion. They alleged that the Biological Opinion was contrary to "scientifically and commercially available evidence" when it concluded that the fish populations in question are declining; in fact, the populations "are reproducing successfully." Complaint ¶ 13, Pet. App. 37.

These plaintiffs sued under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 et seq., the citizen suit provision of the Endangered Species Act (ESA) § 11, 16 U.S.C. § 1540(g)(1), and the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C). The ESA citizen suit provision provides:

Except as provided in paragraph (2) of this subsection *any person* may commence a civil suit on his own behalf -

(A) to enjoin any person, including the United States and any other governmental instrumentality or agency

(to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof.

16 U.S.C. § 1540(g)(1)(emphasis added).

The Ninth Circuit concluded that while the plaintiffs may have standing under Article III of the Constitution, the ESA requires that they demonstrate that they have prudential standing as well, namely, that their interests are within the zone of interests protected or regulated by the ESA. *Bennett v. Plenert*, 63 F.3d 915, 919 (9th Cir. 1995). The Ninth Circuit concluded that under the ESA, only those plaintiffs who allege an interest in the preservation of endangered species fall within the "zone of interests" protected by the ESA. *Id.* Consequently, property owners and others who claim a competing interest to endangered species are without legal recourse under the ESA. *Id.* at 921.¹

¹ The court of appeals also rejected the plaintiffs' APA claim for the same reason that it rejected the ESA claim, namely, plaintiffs lack prudential standing. *Id.* at 922. Finally, the court of appeals rejected plaintiffs' NEPA claim under the doctrine of hypothetical jurisdiction, *i.e.*, even if plaintiffs did have standing under NEPA, under Ninth Circuit precedent, no NEPA claim lies for a violation of ESA critical habitat designation. *Id.* While these latter two rulings are not directly before the Court, the resolution of the ESA issue will likely affect how these other issues are to be resolved.

SUMMARY OF ARGUMENT

The court of appeals erroneously concluded that the ESA's citizen suit provision is available only to those persons who seek to preserve species. The plain language of that provision makes it clear, however, that "any person" who otherwise meets the standing requirements under Article III of the Constitution can seek judicial review of governmental action taken under the ESA.

Indeed, only those who have a competing interest in the resources with the species in question, such as petitioners and other property owners, ranchers, farmers, and even medical researchers, can be expected to challenge governmental action taken under the ESA to ensure that that economic and other statutory factors are properly considered in the decisionmaking process as Congress intended. Accordingly, the Ninth Circuit was wrong to require that the plaintiffs meet the zone of interests prudential test.

In any event, petitioners easily satisfy the zone of interests test because they seek to protect their interests which are either protected or regulated by the ESA. Finally, amici submit that petitioners clearly satisfy the basic Article III test for standing. In addition to alleging an injury-in-fact, which is undisputed, that injury can be traced to the respondents' conduct and is likely to be redressed by a favorable judicial decision on the merits.

ARGUMENT

I. CONGRESS INTENDED ESA'S CITIZEN SUIT PROVISION TO AUTHORIZE PERSONS SATISFYING ARTICLE III STANDING REQUIREMENTS TO SEEK JUDICIAL REVIEW WITHOUT REGARD TO THE PRUDENTIAL "ZONE OF INTERESTS" TEST OF STANDING.

There can be no doubt that Congress can, if it wishes, authorize plaintiffs to bring suit in federal court to the fullest extent allowed by the "case or controversy" component of Article III without regard to the prudential limitations on standing. *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *Association of Data Processing Service Orgs. v. Camp*, 397 U.S. 150, 154 (1970). Indeed, as recently as two weeks ago, this Court reaffirmed this well-settled proposition when it stated that "prudential limitations [on Article III standing] are rules of 'judicial self-governance' that 'Congress may remove . . . by statute.'" *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 64 U.S.L.W. 4330, 4334 (U.S. May 13, 1996) (citing *Warth v. Seldin*).² Accordingly, the Ninth Circuit was clearly wrong when it held that the prudential zone of interests test of standing was applicable in this case where Congress expressly provided that suit may be brought under the ESA by "any person" who otherwise satisfies Article III standing. 16 U.S.C. § 1540(g)(1).

² The Court held in *United Food* that by enacting a law allowing unions to sue under the Worker Adjustment and Retraining Notification Act, Congress removed a prudential prong of associational standing that otherwise would preclude a labor union from suing to obtain money damages on behalf of its members. *Id.*

The zone of interests test is a judicially imposed prudential limitation on standing that limits the right of judicial review of governmental action to only those litigants whose interests are arguably with the "zone of interests" sought to be protected or regulated by the underlying statute in question. See *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970). This prudential test was adopted by this Court and is employed by other federal courts in those cases where the underlying statute in question does not provide for judicial review.

In enacting the citizen suit provision of the ESA, however, Congress used the broadest and clearest possible language, authorizing "any person" to "commence a civil suit on his own behalf" to "enjoin any person, including the United States and any other governmental instrumentality or agency * * * who is alleged to be in violation of" the ESA or any regulation issued under the ESA. 16 U.S.C. § 1540(g)(1). Congress did not qualify this citizen suit provision with any other language limiting the class of persons who may invoke the federal courts.

Indeed, even with regard to legislation such as the Clean Water Act where Congress employed qualifying language that appeared to limit judicial review provisions to citizens "having an interest which is or may be adversely affected," 33 U.S.C. §§ 1365(a), (g), Congress nevertheless expressed its intent that the "adversely affected" language was coterminous with the Article III injury-in-fact element of standing, rather than constituting an additional prudential factor limiting standing.³ Accordingly, by

³ See S. Conf. Rept. No. 92-1236 reprinted in 1972 U.S.C.C.A.N. 3776 (adopting this Court's definition of "citizen" in *Sierra Club v. Morton*, 405 U.S. 727 (1972), which refers only to the Article III injury-

enacting the unqualified citizen suit provision of the ESA, Congress *a fortiori* intended to obviate the need of the judiciary to impose any prudential limitation on Article III standing.

The Ninth Circuit, however, ignored the plain language of ESA's citizen suit provision and held that plaintiffs must satisfy additional prudential considerations to seek judicial review of agency action under the ESA under the zone of interests test. 63 F.3d 915, 917. The court of appeals was wrong to place this additional hurdle in the plaintiffs' path both as a matter of law and the policy considerations underlying the standing requirement.

In holding that the zone of interests test was applicable in this case, the court of appeals principally relied upon this Court's decision in *Clarke v. Securities Industry Ass'n*, 479 U.S. 388 (1987). 63 F.3d. at 917. *Clarke*, according to the court of appeals, was an "exegesis" of this Court's seminal decision establishing the zone of interests test in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970), and its progeny. 63 F.2d at 917. The court of appeals' reliance on these decisions was misplaced.

In both *Data Processing* and *Clarke*, the Court found that the plaintiffs in those respective cases did have standing because they satisfied the prudential zone of interests test. However, the banking statutes under review in both of those cases did *not* have citizen suit or judicial review provisions as does the ESA; rather, standing was predicated upon the general judicial review provisions of the Administrative Procedure Act, 5 U.S.C. § 702, which applies to all final agency action.

in-fact prong of standing).

The judicial review provision of the APA allows for review of agency action by persons "adversely affected or aggrieved by agency action *within the meaning of a relevant statute*." 5 U.S.C. § 702 (emphasis added). This Court placed its judicial gloss on this APA provision -- "within the meaning of a relevant statute" -- to carry out the intent of Congress by requiring that the interest sought to be protected be "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Data Processing*, 397 U.S. at 153.

Because Congress made it crystal clear in the citizen suit provision of the ESA that "any person" may bring an action, the Ninth Circuit's analysis of cases, whether APA or non-APA cases, and its psychoanalysis of Congress's intent, was simply an unnecessary exercise. In divining the intent of Congress, this Court has consistently held that the plain meaning of the language employed by Congress controls. See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). Because there is no ambiguity in the language Congress has chosen, this Court can safely conclude that Congress intended that all litigants who satisfy Article III standing are entitled to seek judicial review of agency action under the ESA.

As a policy matter, denying standing to litigants with "mere" economic interests makes no sense in light of what the standing doctrine is designed to achieve. "Standing" means that a party has a "sufficient stake" in a controversy to ensure that the issues are litigated in a truly adversarial manner rather than by those with only an academic interest. *Sierra Club v. Morton*, 405 U.S. 727, 730-31 (1972). It is hard to deny that landowners who are losing their water or their right to farm their land have a large stake in the controversy; accordingly, they can be expected to vigorously

challenge the lawfulness of governmental action taken under the ESA.

Even the Ninth Circuit recognized that the petitioners assert a "competing interest" in the "very water the government [wrongly] believes is necessary for the preservation of the species." 63 F.2d at 921 (bracketed language added).⁴ Under these circumstances, there can be no doubt that "the legal questions presented . . . will be resolved, not in the rarefied atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

Thus, the very nature of the Article III injury-in-fact alleged in this case itself obviates the necessity of imposing an additional prudential zone of interests test. In any event, as amici will argue *infra*, those economic interests more than satisfy whatever prudential standing requirement that may be deemed applicable.

⁴ The plaintiffs have alleged, as the Ninth Circuit noted, that the fish are "'reproducing successfully' and will not be adversely affected by the long-term operation of the Klamath project." 63 F.2d at 921; Complaint ¶¶ 1, 13, Pet. App. 32, 37. Because this case was decided on a motion to dismiss, these allegations by the plaintiffs must be accepted as true.

II. THE PLAINTIFFS' ECONOMIC AND OTHER INTERESTS EASILY SATISFY THE PRUDENTIAL ZONE OF INTERESTS TEST.

Even if the prudential zone of interests test is applicable, the Ninth Circuit was wrong to conclude that these plaintiffs failed to satisfy that test. A party satisfies the prudential "zone of interest" test if the plaintiff alleges an interest that is "arguably within the zone of interests to be protected or regulated by the statute" in question. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970); *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 396 (1987) (emphasis added). The petitioners here satisfy both prongs of this disjunctive test.

Plaintiffs assert interests which arguably are within the zone of interests to be protected by the ESA. The Ninth Circuit was wrong to conclude that species protection was the only interest the Congress was concerned with. As the petitioners have amply demonstrated in their brief, Congress responded to public criticism of the ESA and amended it over the years by enacting at least four provisions to encompass and protect the interests of petitioners and those similarly situated:

(1) to require the agencies to "consider the economic impact, and any other relevant impacts" when designating critical habitat (16 U.S.C. § 1533);

(2) to require that Biological Opinions be based on the "best scientific and commercial data available" (16 U.S.C. § 1536(a)(2));

(3) to require that "reasonable and prudent alternatives" to a proposed project that causes jeopardy to a listed species

consider economic factors (16 U.S.C. § 1536(b)(3)(A) and pertinent legislative history); and

(4) to require federal agencies "to cooperate with state and local agencies to resolve water resource issues in concert with conservation of endangered species" (16 U.S.C. § 1531(c)(2)).

While not directly applicable in this case, to this list of protected interests can be added the requirement that the federal government "cooperate" and "consult" with the States in carrying out the ESA. 16 U.S.C. § 1535(a).⁵

The Ninth Circuit wore blinders by ignoring this wealth of evidence of Congress's concern for economic and other interests to be considered in the administration of the ESA. Surely, the interests of the petitioners are "arguably within the zone of interests sought to be protected" by the ESA.

Even assuming, *arguendo*, that plaintiffs' interests are not within the zone of interests to be protected, plaintiffs nevertheless satisfy the prudential zone of interests test because the interests they seek to protect are clearly within the zone of interests regulated by the ESA. In this and other ESA cases, the listing of endangered species, designation of critical habitat, and other actions taken to preserve species invariably have an economic

⁵ The two irrigation districts which are petitioners in this case are political subdivisions of the State of Oregon, and thus, are not technically covered by the cooperation requirement between the federal agencies and States. Compare 16 U.S.C. § 1532(17) (definition of "State") with 16 U.S.C. § 1532(18) (definition of "State agency").

impact on property owners and those who use water and other natural resources. Property owners and others are regulated by the ESA and its attendant civil and criminal penalties prohibiting the "taking" of endangered species, including the alteration of habitat. 16 U.S.C. §§ 1538, 1540.

In the case at bar, the actions of the government have a direct impact on the amount of water resources available to the plaintiffs for irrigation and other uses. The Biological Opinion regulates the water level in the reservoirs by requiring that they be maintained at a certain level. As a direct consequence, the amount of water available to the plaintiffs which they otherwise would be entitled to receive pursuant to the irrigation district's contracts with the United States for water supplies is thereby reduced. Plaintiffs are not simply "arguably within the zone of interests sought to be regulated," they are undeniably placed right in the middle of that zone.

The Ninth Circuit simply ignored how the ESA in this case regulates the plaintiffs, and instead adopted a narrow and crabbed view of the zone of interests test that allows standing for only those who seek to protect endangered species. The court of appeals relied solely on several of its decisions in the environmental area, such as the Clean Water Act and the National Environmental Policy Act, without seriously applying this Court's jurisprudence on the subject. 63 F.2d at 919-22.

If the Ninth Circuit's narrow approach to standing is adopted, then a whole host of environmental statutes will be off limits to property owners, businesses, and others directly regulated by these

laws from seeking judicial review of agency decisions.⁶ The Ninth Circuit's approach should be soundly rejected; instead, amici submit that the approach taken by the Tenth Circuit in *Catron County v. U.S. Fish & Wildlife*, 75 F.3d 1429 (10th Cir. 1996) should be adopted.⁷

⁶ See Emergency Planning and Community Right-to-Know Act of 1986 § 326, 42 U.S.C. § 11046(a); Clean Air Act § 304(a), 42 U.S.C. § 7604(a); Noise Control Act of 1972 § 12, 42 U.S.C. § 4911(a); Deepwater Port Act of 1974 § 16, 33 U.S.C. § 1515(a); Clean Water Act § 505, 33 U.S.C. § 1365 (any "citizen," defined as "person or persons having an interest" *etc.*); Resource Conservation and Recovery Act § 7002, 42 U.S.C. § 6972; Safe Drinking Water Act § 1449, 42 U.S.C. § 300j-8; Toxic Substances Control Act § 20, 15 U.S.C. § 2619; Marine Protection, Research, and Sanctuaries Act § 105(g), 33 U.S.C. § 1415(g). The Outer Continental Shelf Lands Act § 23, 43 U.S.C. § 1349 provides review by "any person having a valid legal interest which is or may be adversely affected"; and the Surface Mining Control and Reclamation Act of 1977 § 520, 30 U.S.C. § 1270, says much the same.

⁷ In *Catron*, the Tenth Circuit found standing to review an ESA decision under NEPA, and held that ESA does not displace NEPA's requirements. More importantly, a regulated entity was found to have standing under NEPA which does not even have an express provision for judicial review. Consequently, the adoption of the approach taken by the Tenth Circuit would necessarily permit judicial review by petitioners under the ESA, which contains a clear citizen suit provision, as well as permit petitioners (and others similarly situated) to litigate their NEPA claim as well.

III. THE NINTH CIRCUIT'S CATEGORICAL RULE THAT ONLY THOSE WHO ALLEGE AN INTEREST IN SPECIES PRESERVATION HAVE PRUDENTIAL STANDING WOULD FOSTER IRRATIONAL AND UNREVIEWABLE DECISIONMAKING UNDER THE ESA, CONTRARY TO THE INTENT OF CONGRESS.

The Ninth Circuit held that "only plaintiffs who allege an interest in the *preservation* of endangered species fall within the zone of interests protected by the ESA." 63 F.2d at 919 (emphasis in original). This limitation on the class of plaintiffs who may seek judicial review under the ESA would frustrate the intent of Congress to ensure that agencies engage in a rational decisionmaking process under the ESA by considering economic and other factors.

As the Ninth Circuit itself recognized:

[W]e are aware that the ESA specifically provides that the government should consider a variety of factors -- *including economic ones* -- in designating critical habitat for species. See 16 U.S.C. § 1533(b)(3). * * * We do not believe that in setting forth the factors to be weighed in formulating a plan for protecting species, Congress intended to do more than *ensure a rational decisionmaking process* by providing guidance for government officials. Certainly, it did not intend impliedly to confer standing on every plaintiff who could conceivably claim that the failure to consider one of those factors adversely affected him. * * * To interpret the statute in the manner suggested by plaintiffs would be to transform provisions designed to

further species protection [rationally] into the means to frustrate that very goal. * * * Accordingly, we hold that the plaintiffs have no standing under the ESA.

63 F.3d at 921-22 (emphasis and brackets added).

Amici submit that allowing standing to petitioners in this case and to those whose economic interests are similarly affected would not "frustrate" the very goal of the ESA as the Ninth Circuit feared; on the contrary, it would further that goal. That goal, as even the Ninth Circuit characterized it, is to "ensure a rational decisionmaking process." *Id.* at 921. The only way to "ensure" that the government agency and employees consider the economic and other factors is to have available judicial remedies, including injunctive relief. Certainly, those plaintiffs whose only interest is the protection of the species at all costs would not be expected to "ensure a rational decisionmaking process" by requiring the agency to consider economic and other similar factors.

Congress made the unremarkable political decision in enacting and amending the ESA that such species protection proceed in a rational manner. If agencies are free to escape judicial review of their decisions so long as they take action only in favor of protecting a species, whatever the countervailing costs and science, irrational decisionmaking based on junk science will continue to flourish, and congressional intent frustrated.

The following hypotheticals -- all of which have a factual basis -- amply illustrate how the Ninth Circuit's decision would foreclose judicial review of arbitrary and irrational agency action taken under the ESA that otherwise would cause Article III injury to individuals and property owners who do not allege an interest in species protection. Indeed, this Court's recent decision in

Babbitt v. Sweet Home Chapter of Communities, 115 S. Ct. 2407 (1995), was brought by a group of property owners and logging companies who asserted economic interests rather than any interests in preserving endangered species. If the Ninth Circuit is correct, then this Court lacked jurisdiction to decide the *Babbitt* case.

Incidental take permits. Suppose the Fish and Wildlife Service (FWS) concludes that a company's barge operations on a branch of the Mississippi River affect an endangered freshwater snail. FWS says it will issue an incidental take permit under ESA § 10(a), but only on condition that the permittee donate \$100,000 to the FWS fisheries lab in Bay St. Louis, Mississippi. If the company refuses to pay, it has no standing to challenge the denial of the permit under the Ninth Circuit's categorical rule because the plaintiff's motive is not species protection.

Critical habitat. FWS lists as endangered a bird known as the bluegray gnatcatcher, based on information that the public is not allowed to see. As a result, billions of dollars' worth of coastal foothill land in California is suddenly undevelopable. Cf. *Laguna Greenbelt, Inc. v. United States DOT*, 42 F.3d 517 (9th Cir. 1994). Under the decision below, no county, affected city, builder, landowner, or any scientist has standing to challenge the listing, unless the motivation is to preserve the species (which, according to some biologists, is not a "species" at all).

Critical habitat designation. FWS decides that an endangered prairie mole cricket lives only on 10 parcels of land in Oklahoma; nine are owned by state and federal agencies and one owned by a farmer. FWS decides that only the farmer's parcel should be listed as critical habitat because FWS does not want to interfere with the activities of the state and federal agencies on the

public lands. The farmer has no standing to challenge the decision.

Medical research. A scientist applies for a permit to take an endangered fish because the scientific community thinks a compound in its blood may hold a clue to preventing Alzheimer's disease. The scientist does not need to kill the fish; he intends only to draw a milliliter of blood, which is done routinely to other species of sucker in the same genus without harming the fish. FWS refuses to issue the permit. The scientist, whose interest is human health rather than the welfare of the fish, has no standing.

Scientific permits. A scientist wants to place tiny bands on the feet of Newell's shearwaters, a threatened species of birds. Scientists handle the young shearwaters each autumn on Kauai, Hawaii, when they are found dazed on the roads on their first journey from the mountains to the sea after being attracted by street lamps. Because the scientists handle the birds when they are collected to be released at sea, they are required to apply for a take permit. FWS nevertheless says that the applicant for the permit will not be allowed to do his study. Banding a known number of birds and later observing the percentage of birds that is banded is the only feasible way to estimate the size of the population. The study may show that the species has fully recovered and should no longer be listed as threatened. But under *Bennett*, the scientific community has no standing to challenge the FWS; the threatened species will thus continue in perpetuity to be listed as such even though it is fully recovered and no longer entitled to that status.

Delisting decisions. The scientific community has argued for a decade that the California brown pelican has fully recovered and should be removed from the endangered species list. Although the

Secretary of the Interior is required by ESA section 4(c)(2) to remove such species from the list every five years, the Secretary has elected to devote his resources to adding more species to the list. Southern California fishermen who are affected by the erroneous listing of the brown pelican have no standing.

Hardship Permits. A widow's net worth is invested in a parcel of land in Michigan that contains a pond containing the endangered Hungerford's crawling water beetle. The widow wishes to develop the parcel in a manner that might affect the existence of the pond and requests a hardship permit from FWS under ESA § 10(b). FWS refuses to issue the permit. The widow has no standing and risks a \$50,000 criminal fine and a year in prison if she develops her land.

* * * * *

The government may argue that landowners or scientists have standing if they are denied a permit or are regulated by a permit, and especially if they are assessed a penalty. But why are these hypotheticals distinguishable from the instant case? Not because the zone of interest test should come out differently under the Ninth's Circuit categorical rule in *Bennett*, for the interests of the hypothetical farmers, landowners, and scientists are no more the preservation of wildlife than they are in *Bennett*.

If there is a distinction, then it must be either that the effect of the statute on the *Bennett* plaintiffs was not direct enough (which goes to the "imminent injury" element) or that allowing judicial review would not be likely to remedy the harm (which goes to "redressability"). We address these issues below. For now, it is enough to say that the plaintiffs do not lack standing by

virtue of the zone of interests test relied on by the court of appeals.

IV. PLAINTIFFS MEET THE "CAUSATION" AND "REDRESSABILITY" REQUIREMENTS OF ARTICLE III STANDING.

The government argued for the first time in this Court that even though petitioners suffered an injury-in-fact, they failed to satisfy the other two prongs of Article III standing, namely, that their injury can be traced to the issuance of the flawed Biological Opinion, and that their injury is likely to be redressed by a favorable ruling voiding that decision. See U.S. Opp. Cert. at 9-13.

This argument is spurious. It works only if one assumes, contrary to the evidence of this very case, that the FWS's opinion has little influence on its sister agencies. And yet it can hardly be denied that changing the Biological Opinion would likely change the outcome of the case and the impact on plaintiffs' water rights. In any event, a court should not indulge a presumption that agencies will not at least seriously consider biological opinions that federal law directs them to consider.

"[A] party seeking judicial relief need not show to a certainty that a favorable decision will redress his injury. A mere likelihood will do [A] plaintiff need not 'negate every speculative and hypothetical possibilit(y) . . . in order to demonstrate the likely effectiveness of judicial relief.'" *National Wildlife Federation v. Hodel*, 839 F.2d 694, 705-06 (D.C. Cir. 1988).

In this case, the FWS recommended that minimum water levels be maintained and a sister agency accepted it. Furthermore, the plaintiffs have alleged in their Complaint that the Bureau of

Reclamation "will abide by the restrictions imposed by the Biological Opinion." Pet. App. 32. Because this case was decided on a motion to dismiss, all allegations of fact, including this one, must be regarded as true. Accordingly, the plaintiffs have satisfied both the "causation" and "redressability" prongs of Article III standing.

Even if it is determined that petitioners failed to allege facts sufficient to demonstrate causation and redressability, nevertheless, it would appear that they have established "procedural standing" as described in *Lujan v. Defenders of Wildlife*, 112 S. Ct. at 2142. In *Lujan*, this Court suggested that plaintiffs could seek to "enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs (*e.g.* . . . the procedural requirement for an environmental impact statement before a federal facility is constructed next door to them)." *Id.* In further explaining this notion of procedural standing, this Court further noted that:

There is this much truth to the assertion that "procedural rights" are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right *without meeting all the normal standards for redressability and immediacy*. Thus, under our case-law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an Environmental Impact Statement, even though he cannot establish with any certainty that the Statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.

112 S. Ct. at 2142-43, n.7 (emphasis supplied).

In the instant case, the plaintiffs also alleged a violation of the procedural requirements of NEPA when the agency failed to prepare an environmental assessment prior to determining critical habitat for the fish in question. Whether or not the Biological Opinion constitutes an "implicit" rather than formal designation of critical habitat, the issue is whether or not the opinion constitutes a "major federal action" under NEPA; if it does, then the NEPA requirements are triggered. 42 U.S.C. § 4332(C)(2).

But even if the United States is correct in stating "[t]hat there is no such thing as an 'implicit' designation of critical habitat under the ESA" and that only formal designations are subject to ESA's procedures, U.S. Opp. Cert. at 12, n.6, plaintiffs' allegations can be fairly construed to mean that critical habitat has been designated *de facto*, and that the formal procedures required by the ESA for establishing critical habitat (*e.g.*, notice and comment) have not been followed. If those statutory procedures had been followed, then the economic and other factors would have been required to be considered by the agency. In short, the agency did indirectly what it could not do directly or formally, namely, designate critical habitat without considering economic and other relevant factors. In that regard, the plaintiffs have procedural rights under the ESA, and satisfy procedural standing under footnote 7 of *Lujan*.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed. "Any person" who meets the Article III standing requirements should be able to bring a citizen suit under the Endangered Species Act.

Respectfully submitted,

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BRAD BENNETT, *et al.*, *Petitioners*,

vs.

MARVIN PLENERT, *et al.*, *Respondents*.

On Writ of Certiorari to the
United States Court of Appeals, Ninth Circuit

**BRIEF OF AMICUS CURIAE STATE OF TEXAS
IN SUPPORT OF PETITIONERS**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS CURIAE	1
STATE OF TEXAS	1
The Self-Governing Interests of the State of Texas Are Adversely Affected by the Ninth Circuit's Decision	2
The Property Interests of the State of Texas and Its Citizens are Threatened	2
The Property Interests of the Plaintiff-Petitioners are Left Unprotected	5
Fundamental Protections of Private Property Are Abandoned by the Ninth Circuit	6
SUMMARY OF ARGUMENT	7
ARGUMENT	8
I. Consequences of the Ninth Circuit's Opinion ...	8
A. The Ninth Circuit's Opinion Renders Hollow the Promise of Article III	8
B. The Ninth Circuit's Failure to Embrace Article III Disrupts the Proper Balance of State and Federal Powers and Damages the Self-Governing Rights of the States and Their Citizens	12
1. The Constitution Protects the Self-Governing Rights of the States, Which Thereby Protect Private Property Rights	12
2. The USFWS Tramples the Private Property Rights of Texas Citizens	15
3. The States and Their Citizens Must Be Able to Vindicate Their Self-Governing and Private Property Rights	19

II. The Analytical Shortcomings of the Ninth Circuit's Analysis	20
A. The Ninth Circuit Misreads 16 U.S.C. § 1540(g)	21
B. The Ninth Circuit Failed to Acknowledge the Significance Given by the Court to Economic Interests in Standing Doctrine ...	25
CONCLUSION	28

APPENDICES

Private Groups Endorsing this Brief	1a
Map of Counties Potentially Affected by USFWS' Designation of Endangered or Threatened Species ...	5a
Letters to Central Texas Landowners	
1. Mr. & Mrs. Igua (Feb. 20, 1991)	6a
2. Marge Krueger	8a
3. Phil Frazier (June 24, 1993)	10a
4. Keith E. Young (Dec. 3, 1993)	12a
5. Patrick Noack (Jan. 13, 1994)	14a
6. Jerri Garner (Jan. 13, 1994)	16a
7. Rex Bohls (Jan. 13, 1994)	18a
8. Lee Sherrod (Jan. 25, 1994)	20a
9. Lee Sherrod (April 14, 1994)	22a
10. Fran and Larry Collmann (Sept. 23, 1994)	25a
11. Glenn Williams/Terry Wynn (Jan. 13, 1994)	28a
12. Stan & Donna Buck (June 9, 1994)	30a
13. Lee Sherrod (Sept. 22, 1994)	32a

TABLE OF AUTHORITIES

CASES

<i>Alabama-Tombigbee Rivers Coalition v. Fish and Wildlife Service</i> , No. 93-AR-2322-S, 1993 WL 646409 (N.D. Ala. Nov. 9, 1993), <i>aff'd</i> , 26 F.3d 1103 (11th Cir. 1994) ...	10
<i>American Tobacco Co. v. Patterson</i> , 456 U.S. 63 (1982) ...	24
<i>Association of Data Processing Service Organizations, Inc. v. Camp</i> , 397 U.S. 150 (1970) ...	26
<i>Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon</i> , 115 S.Ct. 2407 (1995)	28
<i>Bennett v. Plenert</i> , 63 F.3d 915 (9th Cir. 1995)	passim
<i>Calder v. Bull</i> , 3 U.S. (3 Dall.) 386 (1798)	6
<i>California Coastal Comm'n v. Granite Rock Co.</i> , 107 S.Ct. 1419 (1987)	15
<i>Catron County Bd. of Comm'rs, New Mexico v. United States Fish & Wildlife Service</i> , 75 F.3d 1429 (10th Cir. 1996)	21
<i>Central Arizona Water Conservation Dist. v. United States Environmental Protection Agency</i> , 990 F.2d 1531, 1538-39 (9th Cir. 1993)	21
<i>Clarke v. Securities Industry Ass'n</i> , 479 U.S. 388 (1987) ...	20
<i>Crowell v. Benson</i> , 285 U.S. 22 (1932)	19
<i>Delaware v. New York</i> , 113 S. Ct. 1550 (1993)	15

<i>Dolan v. City of Tigard</i> , 114 S.Ct. 2309 (1994)	15
<i>Douglas County v. Babbitt</i> , 48 F.3d 1495 (9th Cir. 1995)	21
<i>Federal Energy Regulatory Comm'n v. Mississippi</i> , 456 U.S. 742 (1982)	13
<i>Fidelity Federal Savings & Loan Assoc. v. de la Cuesta</i> , 458 U.S. 141 (1982)	15
<i>Gladstone Realtors v. Village of Bellwood</i> , 441 U.S. 91 (1979)	23
<i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991)	13
<i>Immigration and Naturalization Service v.</i> <i>Cardoza-Fonseca</i> , 107 S.Ct. 1207 (1987)	22, 24
<i>Lake County v. Rollins</i> , 130 U.S. 662 (1889)	22
<i>Lane County v. Oregon</i> , 7 Wall. 71 (1869)	14
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992)	21, 27
<i>Mausolf v. Babbitt</i> , 913 F. Supp. 1334 (D. Minn. 1996)	10, 11
<i>Mulane v. Central Hanover Bank & Trust Co.</i> , 339 U.S. 306 (1950)	19
<i>Nevada v. Hall</i> , 440 U.S. 410 (1979)	12
<i>New York v. United States</i> , 112 S.Ct. 2408 (1992)	13
<i>Pacific Northwest Generating Co-op v. Brown</i> , 25 F.3d 1443, 1450 (9th Cir. 1994)	21

<i>Perrin v. United States</i> , 444 U.S. 37 (1979)	22
<i>Rodriguez v. United States</i> , 107 S.Ct. 1391 (1987)	23, 24
<i>Seminole Tribe v. Florida</i> , 116 S.Ct. 1114 (1996)	12
<i>State of Idaho, by and through Idaho Public Utilities</i> <i>Comm'n v. Interstate Commerce Comm'n</i> , 35 F.3d 585 (D.C. Cir. 1994)	21
<i>Tennessee Valley Authority v. Hill</i> , 437 U.S. 153 (1978)	23, 25
<i>Texas v. White</i> , 7 Wall. 700 (1869)	19
<i>United States v. Geyser</i> , 932 F.2d 1330 (9th Cir. 1991)	22
<i>United States v. Locke</i> , 471 U.S. 84 (1985)	24
<i>United States v. Lopez</i> , 115 S.Ct. 1624 (1995)	12
<i>Valley Forge Christian College v. Americans United for</i> <i>Separation of Church and State, Inc.</i> , 454 U.S. 464 (1982)	9
<i>Warth v. Seldin</i> , 422 U.S. 490 (1975)	15
<i>Watt v. Alaska</i> , 451 U.S. 259 (1981)	21
<i>Watt v. Energy Action Educational Foundation</i> , 454 U.S. 151 (1981)	27

CONSTITUTIONAL PROVISIONS

U.S. Const. art. III	passim
U.S. Const. art. IV, § 4	2
U.S. Const. amend. X	passim
U.S. Const. amend. XI	14

STATUTES, LEGISLATIVE MATERIALS AND RULE

16 U.S.C. § 3(b)	3
16 U.S.C. § 1531(c)(2), §2(c)(2)	3
16 U.S.C. § 1532	3
16 U.S.C. § 1532(5)(A)	25
16 U.S.C. § 1532(13)	3
16 U.S.C. § 1533	3
16 U.S.C. § 1533(a)	25
16 U.S.C. § 1533(a)(1)	25
16 U.S.C. § 1533(b)(1)(A)	25
16 U.S.C. § 1533(b)(2)	25
16 U.S.C. § 1536	18
16 U.S.C. § 1538	16
16 U.S.C. § 1540	21
16 U.S.C. § 1540(c)	25
16 U.S.C. § 1540(g)	21, 22, 23, 25
16 U.S.C. § 1540(g)(1)(A)	22
16 U.S.C. § 1540(g)(1)(B)	22
16 U.S.C. § 1540(g)(1)(C)	22, 25
33 U.S.C. § 1365	24
40 U.S.C. §§ 531, 533	15
43 U.S.C. §§ 371, 485(f)-(h), 511-13	5
43 U.S.C. §§ 1701, 1712(c)(9)	15
Publ. No. 95-632, 92 Stat. 3571 (1978)	25
H.R.Rep. No. 95-1625	25
S. Rep. No. 95-874	25
H.R. Conf. Rep. No. 95-1804, 95th Cong., 2d Sess. (1978)	25
Sup. Ct. R. 37.4	1

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Bryan Arroyo, <i>Threatened and Endangered Species of Texas</i> , DEPARTMENT OF THE INTERIOR, U.S. FISH AND WILDLIFE SERVICE, Aug. 1992	3
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Deborah Jones Merritt, <i>The Guarantee Clause and State Autonomy: Federalism for a Third Century</i> , 88 COLUM. L. REV. 1, 23 (1988) (" <i>Guarantee Clause and State Autonomy</i> "), citing <i>The Federalist</i> No. 39 (James Madison)	14
J.B. Ruhl, <i>Section 7(A)(1) of the "New" Endangered Species Act: Rediscovering and Redefining the Untapped Power of Ordeal Agencies' Duty to Conserve Species</i> , 75 ENVTL. L. 1107, 1109 (1995)	18
La Pierre, <i>The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation</i> , 60 Wash. U.L.Q. 779, 790-92 & nn. 31-33 (1982)	14
R. DICKERSON, <i>THE INTERPRETATION AND APPLICATION OF STATUTES</i> , 231 (1975)	22
<i>San Antonio Express News</i> , July 27, 1994	5

No. 95-813

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**BRIEF OF AMICUS CURIAE STATE OF TEXAS
IN SUPPORT OF PETITIONERS**

**INTEREST OF AMICUS CURIAE
STATE OF TEXAS**

The Attorney General of the *amicus curiae* State of Texas submits this brief, pursuant to Supreme Court Rule 37.4, on behalf of the State of Texas ("Texas"), and the private groups that have endorsed this brief,¹ to bring to the attention of the Court the adverse impact of the Ninth Circuit's decision in *Bennett v. Plenert*, 63 F.3d 915 (9th Cir. 1995) ("*Plenert*") on

¹ The list of the twenty-one private groups that have endorsed this brief is included in the Appendix at 1a. Citations to the Appendix to this brief will be cited as: Texas App. at 1a.

the state's self-governing rights and powers. Texas also submits this brief in its capacity as *parens patriae* in order to ensure that the doors of the federal judiciary remain open to Texas citizens, when necessary, to protect their rights in property and interests in contracts.²

The Self-Governing Interests of the State of Texas Are Adversely Affected by the Ninth Circuit's Decision

The property rights of Texas citizens are defined, maintained, and protected by state laws, and rules, regulations, and ordinances promulgated pursuant to state law. This body of state law and the right to establish and set forth the preservation of private property under state law is protected from federal government intrusion by the Tenth Amendment,³ the Guarantee Clause,⁴ and the inherent structure of the United States Constitution.

The Property Interests of the State of Texas and Its Citizens are Threatened

The listing of a species as endangered and the concomitant designation of the critical habitat by a federal agency have a

² Throughout this brief, the plaintiffs below will be referred to as "plaintiff-petitioners" and the defendants below will be referred to as "defendant-respondents."

³ U.S. CONST. amend. X ("Tenth Amendment"): "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

⁴ U.S. CONST. art. IV, § 4 ("Guarantee Clause"): "The United States shall guarantee to every State in this Union a Republican Form of Government."

direct impact on the interests of private land owners in Texas.⁵ Every time the United States Fish and Wildlife Service ("USFWS") lists and designates critical habitat under sections 3 and 4 of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1532, 1533, it potentially affects a substantial portion of the land in Texas. This is so because of the USFWS' over-expansive interpretation and use of the ESA and because over ninety-eight percent of the land in Texas is private or state-owned land. The federal government's actual ownership interest in Texas land is negligible. Texas' experiences with the USFWS illustrate the magnitude of the problem.

Sixty-five species found in Texas have been listed as endangered or threatened under the ESA by the USFWS.⁶ The sixty-five species listed are found in approximately 212 of Texas' 254 counties. See Bryan Arroyo, *Threatened and Endangered Species of Texas*, DEPARTMENT OF THE INTERIOR, U.S. FISH AND WILDLIFE SERVICE, Aug. 1992.

⁵ Indeed, Texas also has a direct interest in the outcome of this issue. Because Texas is a "person" within the meaning of § 3(B) of the Endangered Species Act, 16 U.S.C. § 1532(13), it is entitled to sue under the citizen suit provision. See 16 U.S.C. § 1531(c)(2), § 2(c)(2) of the ESA, which states that it is the "policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species." The Ninth Circuit's decision not only violates the Congressional policy stated in § 2(c)(2), it directly limits Texas' ability to bring an action for violations of the ESA.

⁶ Forty-six of these species are fish or wildlife. Included in the listing are the following: the golden-cheeked warbler (*Dendroica chrysoparia*), the Texas blind salamander (*Typhlomolge rathbuni*), Texas wild rice (*Zizania texana*), the fountain darter (*Etheostoma fonticola*), the Houston toad (*Bufo houstonensis*), the piping plover (*Charadrius melodus*).

Thus, every time the USFWS lists or designates critical habitat, it potentially affects some portion of ninety-eight percent of the land in 212 Texas counties, or approximately 255,506 square miles. See Texas App. 5a (showing the counties potentially affected should the USFWS designate critical habitats for all sixty-five listed endangered or threatened species in the state).

The listing of a species and the designation of a critical habitat by the USFWS resonates in every corner of Texas: it reduces the value of land and diminishes the ability of land owners to "capture" groundwater; it affects the use and productivity of land whose legal title is held by the State of Texas for the benefit of the school children supported by the Permanent School Fund; it diminishes the value and use of state parks, as when the Texas Parks and Wildlife Commission had to delay plans to expand a golf course at a state park because the expansion had to be evaluated and approved by the USFWS because of the "possible" presence of the Houston toad, (a species listed under the ESA as endangered); and, in a scenario reminiscent of the one in *Plenert*, it will affect the ability of the Canadian River Municipal Water Authority, a political subdivision of the State of Texas similar to the water districts in Oregon, to fulfill its duties and mission to facilitate the delivery of water to Texas Panhandle residents because of the listing of the Arkansas River shiner.

As if to add insult to injury, top federal administrators, some of whom are far removed from Texas, fail to grasp the import of their actions. For example, the Director of the USFWS has

said, while discussing a listed species, the golden-cheeked warbler, that "[t]he critical-habitat designation doesn't add anything to the constraints on the average landowner" implying that the mere listing of a species is sufficient to constrain the landowner. See "Agency defends plan for songbird habitat," *San Antonio Express News*, July 27, 1994. See also in the same article comment of Nancy Kaufman, Deputy Director of the USFWS, "[i]f a farmer is currently going out and destroying this [warbler] habitat, it is already a problem".

The USFWS is enforcing a regulatory regime under the ESA where it dictates to the State of Texas, the political subdivisions of the state, and private landowner-citizens what they can and cannot do with their property. Under *Plenert* this *de facto* regulatory scheme graphically illustrates why the Court must give property owners in every state the ability to sue to protect their interests in the courts of the United States.

The Property Interests of the Plaintiff-Petitioners are Left Unprotected

The plaintiff-petitioners, ranchers and water districts rely on water provided under federal contract,⁷ by the Klamath Project, a federal reclamation project, for "*commercial purposes, as well as for their primary sources of irrigation water.*" See Appendix

⁷ In 1905 Oregon and California ceded title in the Lower Klamath and Tule lakes to the United States for project development under the Reclamation Act of 1902 to drain lakebed lands in order to store and provide water for irrigation and other purposes out of the sale of water rights to homesteaders on the reclaimed project lands. See generally 43 U.S.C. §§ 371, 485(f)-(h), & 511-13.

to Petition for Writ of Certiorari ("Cert. App.") 33-34, ¶ 5 (emphasis added). The plaintiff-petitioners, who were denied standing to challenge the federal government's decision to stop providing water for their needs -- individuals and state political subdivisions with vested and concrete economic interests, secured in part by contractual agreement with the federal government -- possess significant interests that provide the Court with a unique opportunity to clarify the law of standing to ensure that individuals, political subdivisions of the states, and states with concrete economic interests that are threatened by agency action will, at a minimum, have access to the courts of the United States to protect their interests.

Fundamental Protections of Private Property Are Abandoned by the Ninth Circuit

It is a bedrock principle of our jurisprudence that interests in property are determined in the courts according to the rule of law.

[T]he right of property, . . . as well as the mode, or manner, of acquiring property, and of alienating or transferring, inheriting or transmitting it, is conferred by society, is regulated by civil institutions, and is always subject to the rules prescribed by positive law.

Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) (Chase, J.) (emphasis added). The Ninth Circuit, in *Plenert*, silenced plaintiff-petitioners, ranchers and water districts, denying them the ability to protect their interests in property. If the Court lets

the result in *Plenert* stand, the Constitution's guarantee to protect, according to the rule of law, vested property rights and contract rights of its citizens in the courts of the United States is also silenced.

Texas writes because it is important that the law of standing include plaintiffs such as the plaintiff-petitioners, whose concrete economic interests meet constitutional and prudential standards. If these plaintiff-petitioners lack standing, as a practical matter the courts of the United States will be closed to most plaintiffs attempting to review agency action under the ESA or the Administrative Procedure Act.

SUMMARY OF ARGUMENT

This appeal presents the Court with two straightforward questions of standing under the ESA.⁸ The Ninth Circuit's *Plenert* decision must be overruled because it unnecessarily restricts the reach of Article III of the United States Constitution,⁹ it violates fundamental principles of federalism, it misreads the citizen suit provision of the ESA, it violates the principles of stare decisis by ignoring case precedence, and it misapplies the law of standing established by this Court. The

⁸ The first question is whether the broad grant of standing in the citizen suit provision of the ESA is subject to a zone of interests test. If the Court answers no, the inquiry ends. If the Court answers yes, the second question is whether plaintiff-petitioners -- public water suppliers and water users with economic interests -- fall within the zone of interests protected or regulated by the ESA.

⁹ U.S. Const. art. III

Ninth Circuit's decision will leave landowners and political subdivisions of the states barred from the courtroom while federal agencies make policy decisions without supervision and regard to the rule of law.

ARGUMENT

I. Consequences of the Ninth Circuit's Opinion

A. The Ninth Circuit's Opinion Renders Hollow the Promise of Article III

The Ninth Circuit denied standing to plaintiffs who have meritorious causes of action to protect valuable property rights. These plaintiffs clearly have standing, under both an Article III analysis and an analysis under the prudential zone of interests test. The decision challenged here tramples the constitution's guarantee to citizens of a judicial forum for protection of their rights and interests in property and it permits unsupervised policy making, exempting a federal agency from meaningful judicial review.

Article III defines the limits of federal judicial power and determines who may come to the federal courts to seek judicial relief.

[I]t is a part of the basic charter promulgated by the Framers of the Constitution at Philadelphia in 1787, a charter which created a general government, provided for the interaction between that government and the governments of the several States, and was later amended so as to either enhance or limit

its authority with respect to both States and individuals.

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 476 (1982) ("Valley Forge"). *Valley Forge* recognizes that Article III guarantees to the states and its citizens access to the courts for redress of injuries to them, so long as they meet the minimum dictates of Article III. The Ninth Circuit's opinion breaks the promises embodied in Article III. *See Valley Forge*, 454 U.S. at 471-76 (discussing constitutional and prudential principles, all of which are embodied within the context of the guarantees of the constitution).

The Ninth Circuit's *Plenert* ruling allows federal environmental agencies to immunize themselves from suit so long as they characterize their actions as protecting endangered or threatened species. The Ninth Circuit achieved this immunization by making a value-laden decision, unauthorized by Article III or the ESA, that some plaintiffs are more deserving of federal judicial recourse than others. A district court from the Northern District of Alabama wisely refused to take the course taken by the Ninth Circuit, explaining:

To limit standing to public interest groups who complain of the possible endangerment of a species, asserting an aesthetic, or moral, or a scientific, or a philosophical interest, is both unfair and one-sided, and invites disingenuous pleading by parties who have legitimate interests of whatever kind. *There is no reason for only one side of an issue to have access to*

a federal court. Public and judicial scrutiny of the listing process of the Endangered Species Act and its regulation is part of the legislative design to guarantee fair and full access by all persons and entities truly interested in the outcome including those whose interest is economic in whole or in part.

Alabama-Tombigbee Rivers Coalition v. Fish and Wildlife Service, No. 93-AR-2322-S, 1993 WL 646409 (N.D. Ala. Nov. 9, 1993), *aff'd*, 26 F.3d 1103 (11th Cir. 1994) (emphasis added).

The ESA, of course, speaks to species protection, but it also contains a broad citizen suit provision allowing a wide range of plaintiffs to sue the federal government. The views of the Ninth Circuit, advocated by defendant-respondents, restrict the ESA's citizen suit provision and reduce it to the propositions that only those asserting a supposedly pro-species position have standing, and that no one may sue to complain of an agency's actions as being too protective. These propositions, if accepted by the Court, would render meaningless the ESA citizen suit provision. *See infra* at 22, discussion of the Ninth Circuit's erroneous reading of 16 U.S.C. § 1540(g). *See, e.g., Mausolf v. Babbitt*, 913 F. Supp. 1334, 1342 & n.13 (D. Minn. 1996) ("*Mausolf*") (questioned about who could challenge a federal government action "overzealously" protecting an endangered species, the "[federal] defendants took the remarkable position that such an action would be immune from challenge, and entirely beyond review, because it benefits, rather than harms, endangered or threatened species"). These interpretations cannot be the law, at least under our constitutional system of governance.

The court in *Mausolf* held that "interests other than those asserted on behalf of endangered species also fall within the zone of interests protected by the ESA" and stated that it was:

unwilling to adopt the view that the FWS [United States Fish and Wildlife Service] is unrestrained if it cloaks any of its acts in the laudable robe of endangered and threatened species protection. This is a form of totalitarian virtue -- a concept for which no precedent has been advanced and which is foreign to the rule of law. It is instead, the Court's view that the FWS must operate within the parameters of the ESA.

913 F. Supp. at 1342.

The Constitution demands that litigants who meet standing requirements (constitutional and prudential) be heard. Congress in the ESA broadly encourages citizen participation in an unequivocal voice. The Ninth Circuit's decision, if allowed to stand, would render meaningless the dictates of Article III and the citizen suit provision of the ESA, allowing federal environmental regulatory agencies to escape judicial review. Put another way, the Ninth Circuit's view of judicial process would be akin to a baseball game in which only one team got to bat, while the other team was perpetually playing defense on the field -- assuming it were allowed to leave the dugout, or even enter the stadium in the first place.

B. The Ninth Circuit's Failure to Embrace Article III Disrupts the Proper Balance of State and Federal Powers and Damages the Self-Governing Rights of the States and Their Citizens

The Ninth Circuit's improper reading of Article III and the citizen suit provision of the ESA, denying the self-governing rights of the states and their citizens to protect vested economic interests, infringes upon additional constitutional safeguards.

1. The Constitution Protects the Self-Governing Rights of the States, Which Thereby Protect Private Property Rights

The proper balance between the federal government and the states in "our federalism" is textually preserved by the Tenth Amendment and the Guarantee Clause, and is embedded in the inherent structure of the Constitution.¹⁰ See *Nevada v. Hall*, 440 U.S. 410, 433 (1979) (Rehnquist, J., joined by Burger, C.J., dissenting). Certain irreducible principles flowing from the Constitution protect the interests of the states and their citizens.

By constituting a federal government of limited powers, while reserving "the powers not delegated to the United States, nor prohibited by it" to the states and the people, the Constitution established a framework in which the states

¹⁰ The appropriate balance between the states and the federal government is further safeguarded by the Eleventh Amendment as well as by proper limitations on the powers of Congress under the Commerce Clause. See *United States v. Lopez*, 115 S.Ct. 1624 (1995). See also *Seminole Tribe v. Florida*, 116 S.Ct. 1114 (1996) (The Court reiterated that: "each State is a sovereign entity in our federal system"; the Eleventh Amendment limits federal courts' jurisdiction under Article III; and "(t)he [Eleventh] Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity.").

retained "substantial sovereign authority." *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 762 (1982) ("FERC"). See *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). If the states or the people have not conferred a power upon Congress, then *a fortiori* a federal agency cannot assume that power in derogation of the Tenth Amendment. See *New York v. United States*, 112 S.Ct. at 2417 (1992) ("*New York*") ("[I]f a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.").

The Guarantee Clause is predicated on the proposition that state governments are accountable to their citizens with respect to fundamental decisions about how to allocate, control, and use resources and define property rights. *FERC* at 761. A state's "republican form" of government is diminished when its ability to make decisions is fettered, constrained, or overridden by a federal agency voluntarily or otherwise acting *ultra vires*.¹¹ These inherent protections prevent an abuse of power by the federal government. See *New York*, 112 S.Ct. at 2431 (citations omitted) ("The Constitution does not protect the sovereignty of the States . . . as abstract political entities. Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.").

¹¹ Of course, pursuant to the Supremacy Clause and assuming a basis for exercising a power (e.g., the Commerce Clause or the Spending Clause), Congress can intrude into state sovereignty and override state law. The requirement, however, is that Congress must plainly state that it intends to override state law.

The Guarantee Clause, like the Tenth Amendment, protects states from an over-intrusive federal government ensuring that the states and the citizens of the states retain control over the essential elements of self-governance.¹²

Thus, the federal system of government created by the Constitution under the Guarantee Clause, the Tenth Amendment, and the Eleventh Amendment, established a national government operating in a mutual sphere of influence with state governments that act as independent political communities with the authority to make decisions of self-governance that "include the power to structure and organize the processes of government." La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 Wash. U.L.Q. 779, 790-92 & nn. 31-33 (1982). See *Lane County v. Oregon*, 7 Wall. 71, 76 (1869). The right of states to control incidents of self-governance creates "a healthy balance of power between the states and the federal government [that] will reduce the risk of tyranny and abuse from either front." *New York*, 112 S.Ct. at 2431.

There is no incident of self-governance more fundamental to the processes of government than the system of laws that define

¹² The control of elected officials by the electorate and their accountability to the citizens who entrust them to office is the *sine qua non* of a republican form of government. "Since at least the eighteenth century, political thinkers have stressed that a republican government is one in which the people control their rulers [citing J. Locke, *Second Treatise of Government*, 149]." Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 23 (1988) ("Guarantee Clause and State Autonomy"), citing *The Federalist* No. 39 (James Madison).

and protect the property of the citizens of the various states.¹³ Indeed, under the police power reserved to the states, and protected by the Constitution, state and local governments are responsible and entitled to enact, maintain, and enforce zoning,¹⁴ land use planning, and natural resource management laws to regulate and govern the use of land and water.

2. The USFWS Tramples the Private Property Rights of Texas Citizens

The USFWS has construed the listing and designation provisions of the ESA in an alarming manner. See *supra* at 2. Because of the over-expansive use of the listing and designation provisions, as well as other overly intrusive interpretations of the ESA, the State of Texas is concerned that USFWS has and

¹³ "Property interests, of course, are not created by the Constitution, but rather 'by existing rules or understandings that stem from an independent source such as state law.'" *Delaware v. New York*, 113 S. Ct. 1550 (1993) (citations omitted). Real property law, furthermore, has been recognized by the Court as a matter of special concern to the states. *Fidelity Federal Savings & Loan Assoc. v. de la Cuesta*, 458 U.S. 141, 153 (1982).

¹⁴ "[Z]oning laws and their provisions . . . are peculiarly within the province of state and local legislative authorities." *Warth v. Seldin*, 422 U.S. 490, 509 n.18 (1975). See *Dolan v. City of Tigard*, 114 S.Ct. 2309, 2317 (1994) ("[T]he authority of state and local governments to engage in land use planning has been sustained against constitutional challenge."). The Court has recognized that the states' land use planning powers are formidable. See *California Coastal Comm'n v. Granite Rock Co.*, 107 S.Ct. 1419, 1431 (1987) ("[E]ven within the sphere of the Property Clause, state law is preempted only when it conflicts with the operation or objectives of federal law, or when Congress 'evidences an intent to occupy a given field.'"). See also *Federal Urban Land Utilization Act*, 40 U.S.C. §§ 531, 533 and *Federal Land Policy and Management Act of 1976*, 43 U.S.C. §§ 1701, 1712(c)(9) where Congress has also directed federal agencies to cooperate with local land use planning and zoning measures that would not otherwise apply to federal property.

will contrive a *de facto* comprehensive resource management scheme in Texas that prevents landowners and the State of Texas from using their land, property, and resources in ordinary, customary ways (such as building homes and pumping groundwater) in accordance with state and local law. This resource management scheme violates basic tenets of federalism textually embodied in the United States Constitution, as well as deeply embedded in the federalism structure of the Constitution.

The USFWS' intrusion does not stop with the listing and designation provisions and procedures. In a series of letters to Central Texas landowners in thirty-three Texas counties, the USFWS sought to apply the "take" prohibition of section 9 of the ESA, 16 U.S.C. § 1538, to property recently under consideration for designation as critical habitat for the golden-cheeked warbler.¹⁵ In one letter to a landowner engaged in clearing his property, the USFWS laid out its policy.

This letter is in reference to recent clearing activity on your property. . . . This property supports vegetation that is *possibly* occupied by the federally listed endangered warbler.

. . . .

If the activities taking place on the subject site disrupt the breeding and/or foraging activities of

¹⁵ The letters manifest USFWS' contention and policy that "takes" in violation of the ESA occur whenever a human activity modifying habitat "disrupt[s] the breeding and/or foraging activities" of a listed species. USFWS has taken this position regarding clearing of property throughout much of Central Texas, advising property owners that they may not clear or cut down certain trees without violating or risking violation of the ESA's prohibition against "taking" endangered species. The USFWS has not formally or officially rescinded any of its letters.

the . . . warbler, these activities would constitute a "take" of listed species . . . prohibited under section 9 of the Endangered Species Act (Act) and must be avoided.

See Texas App. 6a for additional examples of these letters (emphasis added).

The individual impact of these letters is devastating. For example, Margaret Rodgers, who owns land in Travis County, has received letters from the USFWS informing her that clearing her land to build a fence may "take" an endangered species, the golden-cheeked warbler. The letters, which are obviously intended to operate *in terrorem*, stated that she could be subject to a fine of up to \$50,000 and imprisonment up to one year. Understandably, she stopped trying to build the fence. The letters did not accuse her of killing or injuring a golden-cheeked warbler or allege that she proximately caused the death or injury of a golden-cheeked warbler (as would be required by the Court in *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 115 S.Ct. 2407 (1995) ("*Sweet Home*"). In fact, they did not even say that any warblers live, or have ever been seen, on her property -- the mere clearing of her land was sufficient reason to prompt the USFWS to send its letters. Hundreds of other landowners in the Texas Hill Country are in Mrs. Rodgers' predicament.¹⁶

¹⁶ Mrs. Rodgers at least knows that she risks civil and criminal penalties being imposed as a result of using her land. But an unknown number of other landowners and governmental entities in Texas are also subject to those penalties for making ordinary use of their land, but do not know it. Indeed, they are unable to know it, because USFWS does not make clear the extent of its regulatory program under section 9 of the ESA.

The State of Texas is additionally concerned that if the USFWS cannot directly use its continuing, over-expansive interpretation of "harm" pursuant to section 9 of the ESA to reach activity on private land (such as the pumping of groundwater or the clearing of cedar trees in which a protected bird *may* nest), it will illegitimately increase its efforts to control those activities indirectly through forced consultation procedures pursuant to section 7 of the ESA, 16 U.S.C. § 1536, with a federal agency having *some* federal program delivery nexus with the landowner. *See, e.g., J.B. Ruhl, Section 7(A)(1) of the "New" Endangered Species Act: Rediscovering and Redefining the Untapped Power of Federal Agencies' Duty to Conserve Species*, 25 ENVTL. L. 1107, 1109 (1995) (section 7 is the "sleeping giant" of the ESA programs and "section 7(a)(1)'s species conservation duty has the potential to eclipse all other ESA programs"). For example, in central Texas, the USFWS could pressure the Farmers Home Administration, utilizing the ESA's section 7 consultation process, to refrain from making or guaranteeing loans to farmers seeking financing for farming activities which depend on the pumping of aquifer water from the Edwards Aquifer.¹⁷ In another setting, the Department of Air Force could be forced to consult with USFWS prior to any redevelopment of Kelly Air Force Base.

¹⁷ In July 1994, the USFWS convened a meeting of approximately 40 federal agencies to discuss the Edwards Aquifer issue and the duty of federal agencies to abide with its over-expansive interpretation of the ESA. *See Sierra Club v. Glickman*, MO-95-CV-091, (W.D. Tex. filed Apr. 28, 1995) (signaling that ESA litigation may switch to the ESA section 7 front).

3. The States and Their Citizens Must Be Able to Vindicate Their Self-Governing and Private Property Rights

Chief Justice Chase in *Texas v. White*, 7 Wall. 700 (1869), discussed the effects of the Ordinance of Secession on the existence of Texas as a member of the Union. In concluding that Texas did not cease to be a state, he recognized that the "preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government." 7 Wall. at 725. The states must be able to access the federal court system not only in order to protect their self-governing powers, but also the self-governing and economic interests of their citizens.¹⁸ If the Court does not allow the states and their citizens to protect their economic interests from rogue actions of federal agencies, the promise of the preservation of the states and their governments is broken.

¹⁸ The denial of the right to bring a suit to protect a property interest, whether that right was created by Congress as in the citizen suit provision of the ESA or exists independently, as in the plaintiff-petitioners' contract with the federal government, may itself be viewed as an injury. By closing the federal judiciary to the plaintiff-petitioners, the Ninth Circuit caused a deprivation of property. *See, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (the denial of the right to bring a lawsuit may constitute a deprivation of property). It is the deprivation of a right to use property coupled with the ability to bring a legal action to enforce that right, that is the core and fundamental attribute of standing, in federal court. *Cf. Crowell v. Benson*, 285 U.S. 22, 86-87 (1932) (Brandeis, J., dissenting) ("Under certain circumstances, the constitutional requirement of due process is a requirement of judicial process.").

II. The Analytical Shortcomings of the Ninth Circuit's Analysis

The Ninth Circuit, in concluding that plaintiff-petitioners did not have standing, employed a multi-step analysis. First, it held that Congress in enacting the citizen suit provision of the ESA did not expand standing to the full limits of Article III, thereby engrafting a zone of interests analysis onto the standing inquiry.¹⁹ Second, the panel of the Ninth Circuit held that the plaintiff-petitioners did not fall within the zone of interests protected by the ESA.²⁰ At each analytical juncture, the Ninth Circuit took the wrong turn. It seriously misread the citizen suit provision of the ESA, failing to give the language its plain meaning. Using ordinary methods of statutory analysis suggests a very different conclusion than that reached by the Ninth Circuit. Additionally, in its analysis of the zone of interests test, the *Plenert* Court failed to give economic interests the significance that they have been

¹⁹ Relying on *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 410 (1987), the Ninth Circuit reasoned that "the fact that a statute contains a citizen-suit provision does not necessarily establish that Congress intended that any particular plaintiff have standing to assert a violation." 63 F.3d at 919. Applying what it called its "consistent use of the zone of interests test in determining the standing of plaintiffs who have sued under citizen-suit provisions," it held that the ESA's citizen suit provision does not automatically confer standing "on every plaintiff who satisfies constitutional requirements and claims a violation of the Act's procedures." 63 F.3d at 919.

²⁰ Having determined that the zone of interests test should be applied, the Ninth Circuit asked whether the "ESA protects plaintiffs who assert an interest of the type asserted here." 63 F.3d at 919. Without much substantive adornment, the *Plenert* court simply answered "in the negative, holding that only plaintiffs who allege an interest in the *preservation* of endangered species fall within the zone of interests protected by the ESA." *Id.* at 919 (emphasis in original).

accorded by other panels within the Ninth Circuit,²¹ by other circuit courts,²² and, most importantly, by this Court. Texas first addresses the misreading of the ESA's citizen suit provision.

A. The Ninth Circuit Misreads 16 U.S.C. § 1540(g)

"The starting point in every case involving construction of a statute is the language itself." *Watt v. Alaska*, 451 U.S. 259, 265 (1981). If the words of a statute in their ordinary and common usage "convey a definite meaning, which involves no absurdity, .

²¹ The Ninth Circuit applied the zone of interests test in a manner inconsistent with its own prior opinions. See, e.g., *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995) (a county's proprietary interest in its lands adjacent to a designated critical habitat represented the necessary concrete interest under *Lujan* and fell within the zone of interests protected by the National Environmental Policy Act); *Pacific Northwest Generating Co-op v. Brown*, 25 F.3d 1443, 1450 (9th Cir. 1994) (plaintiffs with an economic interest [large direct purchasers of hydropower] have a footnote 7 procedural interest in ensuring that the ESA is followed); and *Central Arizona Water Conservation Dist. v. United States Environmental Protection Agency*, 990 F.2d 1531, 1538-39 (9th Cir. 1993) (economic interests of water conservation district and four irrigation districts met Article III requirements and zone of interests test to challenge the final rule of the Environmental Protection Agency under the visibility provisions of the Clean Air Act).

²² The Ninth Circuit also failed to follow the decisions from other circuits. See, e.g., *Catron County Bd. of Comm'rs, New Mexico v. United States Fish & Wildlife Service*, 75 F.3d 1429, 1233-34 (10th Cir. 1996) (county's claimed injuries to its proprietary and procedural interests fall within the zone of interests protected by the ESA where the designation of a critical habitat would cause flood damage to county-owned property); and *State of Idaho, by and through Idaho Public Utilities Comm'n v. Interstate Commerce Comm'n*, 35 F.3d 585, 590-92 (D.C. Cir. 1994) (the specific authority to sue under 16 U.S.C. § 1540(g) coupled with Idaho's proprietary interest in state land surrounding Wallace Branch was sufficient to meet the prudential standing limitation under the ESA).

. . . then that meaning . . . must be accepted” as the expression of Congress’ legislative purpose. *Lake County v. Rollins*, 130 U.S. 662, 670 (1889). See *Immigration and Naturalization Service v. Cardoza-Fonseca*, 107 S.Ct. 1207, 1213 (1987) (“*Cardoza*”) (legislative purpose is expressed by the ordinary meaning of the words used); *Perrin v. United States*, 444 U.S. 37, 42 (1979) (“[U]nless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.”).

In 16 U.S.C. § 1540(g), Congress created a unique three-part citizen suit provision that confers standing to the full extent of Article III.²³ Congress in § 1540(g)(1)(A) allowed “any person” to sue any governmental unit who might be in violation of any provision of the ESA or any regulation flowing from the ESA. Further, in § 1540(g)(1)(C) Congress allowed “any person” to sue the Secretary for failure “to perform any [nondiscretionary] act or duty under section 1533” of the ESA.

The plain meaning of “any” is “any and all”; “any” should be given its natural broad meaning. See *United States v. Geyler*, 932 F.2d 1330, 1333-34 (9th Cir. 1991). Additionally, reference to the lexicon, in the historical and cultural context of the language, is another way to establish plain meaning. See, e.g., R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES*, 231 (1975). The lexicon, through the repeated use of “any person,” “any

²³ Congress under 16 U.S.C. § 1540(g)(1)(B) granted “any person” the authority to file a civil action to compel the Secretary to apply the ESA prohibitions against taking of resident endangered (or threatened) species. Although the taking language is not relevant at this time, this subpart shows that Congress intended to open the courts to as large a group of plaintiffs as possible.

provision of the ESA or any regulation,” and “any act or duty” in subsections (B) and (C), evinces Congress’ desire to open standing under the ESA’s citizen suit provision to the limits of Article III. The language of 16 U.S.C. § 1540(g) “admits of no exception” -- all persons who meet the requirements for standing under Article III, whether on purely aesthetic, recreational, professional, or economic grounds, must be heard. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 173 (1978) (“*TVA*”) (The Court in an ESA case stated: “[o]ne would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act.”).

Finally, any question about the plain meaning of statutory language is conclusively settled where Congress knowingly borrows language that carries an established interpretation. See *Rodriguez v. United States*, 107 S.Ct. 1391, 1393 (1987) (“*Rodriguez*”) (“[I]n passing the Comprehensive Crime Control Act of 1984, Congress acted -- as it is presumed to act -- with full awareness of the well established judicial interpretation.”) (citations omitted). In *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 109 (1979) (“*Gladstone*”), the Court held that Congress had granted standing “as broad as permitted by Article III” in the Fair Housing Act of 1968 when it authorized “any person aggrieved” to file a civil action. Congress’ use of “any,” with the understanding that the word is equated with the broadest grant of standing under Article III, see *Gladstone, supra*, directly supports the position that the plain meaning of the language in 16 U.S.C. § 1540(g) grants full Article III standing. Indeed, Congress knows exactly how to enact a narrower citizen suit provision in environmental legislation.

See 33 U.S.C. § 1365 (limiting an action by a citizen against a governmental entity "who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation").

Once the plain meaning of the statutory language settles the question of legislative intent, legislative history is reviewed "to determine only whether there is 'clearly' expressed legislative intention contrary to that language which would require [a court] to question the strong presumption that Congress expresses its intent through the language it chooses." *Cardoza, supra*, 107 S.Ct. at 1213 n.12. The plain-meaning presumption is so strong that "going behind the plain language of a statute in search of a possibly contrary congressional intent is 'a step to be taken cautiously' even under the best circumstances." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 75 (1982). Nothing in the legislative history of the ESA overcomes the plain language presumption. When the plain statutory language settles a question of statutory construction, "any further steps take the courts out of the realm of interpretation and place them in the domain of legislation." *United States v. Locke*, 471 U.S. 84, 96 (1985). The defendant-respondents' limited view of the citizen suit provision is unpersuasive. See *Rodriguez*, 107 S.Ct. at 1393 (omissions and brackets by the Court) ("Where, as here, 'the language of a provision . . . is sufficiently clear in its context and not at odds with the legislative history, . . . [there is no occasion] to examine the additional considerations of 'policy' . . . that may have influenced the lawmakers in the formulation of the statute.").

As the Court noted in *TVA*:

[c]itizen involvement was encouraged by the Act, with provisions allowing interested persons to . . . bring civil suits in United States district courts to force compliance with any provision of the Act, §§ 1540(c) and (g).

437 U.S. at 181 (citations omitted). The Court did not qualify "citizen." The Ninth Circuit erred when it did.²⁴ Congress in 16 U.S.C. § 1540(g) generally, and in 16 U.S.C. § 1540(g)(1)(C) in particular,²⁵ ensured that plaintiffs who meet Article III standing requirements must have their day in court.

B. The Ninth Circuit Failed to Acknowledge the Significance Given by the Court to Economic Interests in Standing Doctrine

²⁴ The Court's use of "interested person" embraces Congress' broad grant of enforcement authority to any person who meets Article III requirements.

²⁵ The defendant-respondents improperly minimize the significance of 16 U.S.C. § 1540(g)(1)(C). See Brief for the Respondents in Opposition at 11-12 & n.6. Many of the agency actions that led to the filing of this lawsuit were arguably based on section 1533. The ESA process begins with the listing of a species as either threatened or endangered under 16 U.S.C. § 1533 (a). Species listings are based solely upon the best available scientific and commercial data pertaining to the species in question under 16 U.S.C. § 1533 (b)(1)(A). The Secretary must consider five factors in listing a species. See 16 U.S.C. § 1533 (a)(1). The ESA was amended in 1978 to require the Secretary to consider factors other than solely biological factors in designating critical habitat. See Pub.L. No. 95-632, 92 Stat. 3571 (1978); H.R. Rep. No. 95-1625, S. Rep. No. 95-874, H.R. Conf. Rep. No. 95-1804, 95th Cong., 2d Sess. (1978). For example: the Secretary must identify the areas that meet the scientific definition of critical habitat in 16 U.S.C. § 1532 (5)(A); and he is to consider the "economic impact and any other relevant impact of specifying any particular area as critical habitat," see 16 U.S.C. § 1533 (b)(2).

In *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970) ("*Data Processing*"), the Court announced a prudential standing requirement in addition to the Article III standing requirements, for determining whether a plaintiff had standing under the Administrative Procedure Act. The test is "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute." *Id.* at 153.

In *Data Processing*, the Court, treading cautiously, emphasized that an interest "may reflect 'aesthetic, conservational, and recreational' as well as economic values." 397 U.S. at 154. *Data Processing* appeared to presume that plaintiffs asserting economic concerns would meet the zone of interests test. See 397 U.S. at 154 ("We mention these noneconomic values to emphasize that standing may stem from them as well as from the economic injury in which petitioners rely here."). The Court concluded that "[c]ertainly he who is 'likely to be financially' injured . . . may be a reliable private attorney general to litigate the issues of the public interest in the present case." 397 U.S. at 154.

The Court in *Data Processing* recognized the significance of economic values because the linchpin in many standing inquiries, either under Article III or a prudential consideration, is whether the plaintiff alleges a property-based legal interest for which a cause of action lies. See, e.g., Cass R. Sunstein, *What's Standing After Lujan? of Citizen Suits, "Injuries," and Article III*, 91 Mich. L.R. 163, 189, 192 & n.132 (1992) ("The loss of money is a real and tangible harm; the offense produced by objectionable government policy may be intense, but it is merely [an] offense.") ("Sunstein").

The significance of an economic injury is no less important, with regard to the ultimate inquiries into standing, because of the nature of the lawsuit. See Sunstein at 191 ("When Congress creates a cause of action enabling people to complain against racial discrimination, consumer fraud, or destruction of environmental assets, it is really giving people a kind of property right in a certain state of affairs. Invasion of that property right is the relevant injury."). The Court recognized the importance of an economic interest when it held that California, as a participant and beneficiary in federal OCS leasing off the California coast, had standing to challenge the adequacy of the bidding process of the Secretary of the Interior. *Watt v. Energy Action Educational Foundation*, 454 U.S. 151, 161 (1981) ("*Watt*") (California's direct financial stake in federal OCS leasing off the California coast coupled with its interest in seeing that the Secretary of the Interior used the most successful bidding system on all OCS lease tracts gave it standing to challenge the Secretary's refusal to experiment with non-cash-bonus bidding systems.).

The Court has acknowledged that an injury to a "procedural right" to protect concrete interests may support standing under the citizen suit provision of the ESA. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) ("*Lujan*") ("There is much truth to the assertion that 'procedural rights' are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for

redressability and immediacy.”).²⁶ Cf. Sunstein at 226 in footnote seven (a procedural right is created “because it structures incentives and creates pressures that Congress has deemed important to effective regulation”).

Recently, the Court spoke of the interests cognizable under the ESA.

In the elaboration and enforcement of the ESA, the Secretary and all persons who must comply with the law will confront difficult questions of proximity and degree; for, as all recognize, *the [ESA] encompasses a vast range of economic and social enterprises and endeavors*. These questions must be addressed in the usual course of the law, through case-by-case “resolution adjudication.”

Sweet Home, 115 S.Ct. at 2418 (emphasis added).

The concrete property and economic interests of the plaintiff-petitioners, which have been infringed by the actions of the defendant-respondents, are sufficient to support standing under the citizen suit provision of the ESA, regardless of whether the analysis is subjected to the bare Article III requirements or the zone of interests test.

CONCLUSION

This case is about fair access to the courts of the United States. The Ninth Circuit erred when it straight-jacketed the citizen suit provision of the ESA by applying the zone of interests test. A

²⁶ The Court’s phraseology, “a procedural right to protect [a] concrete interest,” refers to a due process right to a judicial determination of an economic interest so that a deprivation of property does not occur. *See supra* at 9.

plaintiff, to have standing under the citizen suit provision, must meet the case and controversy requirements of Article III, nothing more. The plaintiff-petitioners have the most cognizable types of interests, concrete property and contract rights, that litigants need to have standing. They certainly meet the requirements of Article III or even the prudential zone of interests test. Accordingly, for the reasons set forth above, the decision of the Ninth Circuit should be reversed.

Respectfully submitted,

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

JAVIER P. GUAJARDO*
Special Assistant Attorney General
*Counsel of Record

SAM GOODHOPE
Special Assistant Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2191

May 24, 1996 COUNSEL FOR AMICUS CURIAE

APPENDICES

PRIVATE GROUPS ENDORSING THIS BRIEF**Associated Milk Producers, Inc.**

The Association is the nation's largest dairy farmer cooperative. Its members produce twelve percent of the nation's milk supply.

Blackland Cotton & Grain Producers Association

The Association is composed of approximately five thousand cotton and grain producers all interested in the protection of the rights of landowners.

Exotic Wildlife Association

Organization of breeders, owners, ranchers and managers of exotic hoofstock species and alternative livestock interested in conservation, propagation and preservation of exotic species on private land.

Independent Cattlemen's Association of Texas, Inc.

The Association represents approximately 6,000 cattlemen/ranchers throughout the State. Their mission is to be the premier representative of the cattle industry, provide an effective legislative voice for all its members, and have the vision to accept and promote changes which impact their well being.

Riverside and Landowners Protection Coalition

The Coalition is a non-profit corporation whose members own and operate rural land throughout Texas. The group is committed to educating the general public on private property issues and working state and federal agencies to preserve the privacy attached to ownership of private property.

Southern Rolling Plains Cotton Growers Association, Inc.

The Association represents 1,500 various cotton producers dedicated to enhance the standard of living for cotton farmers

through promotion of cotton, participation in research and technology to improve cotton yield and economy of production.

Southwest Association

A regional association which represents various hardware retail stores and farm equipment retail dealers throughout Texas, Oklahoma, Louisiana and New Mexico.

Southwest Meat Association

The Association is an organization representing the meat industry throughout a five state area. Members are mostly small to medium size packers and processors and associated supply companies.

Take Back Texas

A non-profit organization comprised of landowners located primarily in the Texas Hill Country area, seeking to educate the landowning community regarding governmental actions that may affect their property and their property rights.

Texas Ag Industries Association

The Association is a non-profit entity representing the plant food and crop protection industries in Texas.

Texas Agri-Women

The association is a non-profit, non-partisan organization primarily composed of farm and ranch women, agri-business women and consumers working together to develop and promote agriculture.

Texas Association of Agricultural Consultants

TAAC serves as the official organization for private, independent agricultural advisors in Texas. With 61 members, the Association

serves around 1000 farmers and ranchers by recommending production practices that will least adversely affect the environment.

Texas Association of Nurserymen

The organization is a trade association representing the wholesale production, retail garden center, landscape professional and allied supplier segments of the nursery industry in Texas.

Texas Cotton Ginners' Association

A non-profit trade association, consisting of 85% of the gins in the State, that represents cotton ginners on issues impacting the cotton ginning industry of the State.

Texas Cotton Producers, Inc.

A non-profit trade association comprised of the nine regional cotton producing organizations in the State. Acts as a forum for the regional organizations to collectively address issues impacting the Texas Cotton industry.

Texas Farm Bureau

The Bureau is a private non-profit membership corporation committed to the advancement of agriculture and prosperity for rural Texas, with 302,352 current members and affiliated county Farm Bureaus in 211 Texas counties.

Texas Food Processors Association

The organization is a non-profit trade association representing companies engaged in the processing of food products in Texas. It is dedicated to support, promote, and encourage education in all aspects of the food industry in Texas.

Texas Grain Sorghum Association

A voluntary membership organization working on legislative and regulatory issues that affect Texas grain sorghum producers.

Texas Justice Foundation

The organization is a non-profit litigation foundation which supports the principles of free markets, limited government, private property and parental rights as the fundamental structure of a free society.

Texas Seed Trade Association

An organization formed as an effective voice of action in all matters concerning the development, marketing and free movement of seed, associated products and services throughout Texas, the United States and around the world.

Texas Wildlife Association

The Association is a non-profit entity which serves as an advocate for the rights of wildlife, wildlife managers, landowners, and hunters. It is dedicated to the maintenance, management, and enhancement of wildlife habitat on private land.



**Texas Counties Potentially Impacted
By Critical Habitat Designation**

UNITED STATES
DEPARTMENT OF THE INTERIOR

FISH AND WILDLIFE SERVICE

Ecological Services
Stadium Centre Building
711 Stadium Drive East, Suite 252
Arlington, Texas 76011

February 20, 1991

Mr. & Mrs. Mike Igua
P.O. Box 4748
Lago Vista, TX 78645

Dear Mr. & Mrs. Igua:

It has come to our attention that clearing of a strip of woodland has recently occurred on a tract of land located south of FM 1431 in the vicinity of Lago Vista, Texas. We understand that you are one of the joint owners of the property. Information available to us indicates that this property supports prime habitat for the federally-listed endangered golden-cheeked warbler. Destruction of habitat of an endangered species may constitute a "take" of that species as defined by the Endangered Species Act, which prohibits "take" of a federally-listed species unless the "take" is incidental to otherwise lawful activity and a permit in compliance with the Act has been obtained. In this case, a permit under Section 10(a) of the Act would apply. Information on the Section 10(a) permit process is enclosed.

Destruction of endangered species habitat, without a permit, that results in "take" of a federally-listed endangered species could be held to be a violation of the act and could expose a violator to the criminal penalties provided for under Section 11(b)(1) of the Act or to the civil penalties provided for under Section 11(a)(1) of the Act. Section 11(b)(1) provides for a fine of not more than \$50,000 or imprisonment up to one year, or both. Section 11(a)(1) permits assessment of up to \$25,000 as a civil penalty for each violation.

This matter is currently under investigation by Special Agent Alex Hasychak of the Fish and Wildlife Service Law Enforcement Office in San Antonio and by personnel of this office. If you are indeed an owner of the property in question, we respectfully urge that you cease any further land clearing activities and contact Alex Hasychak at (512) 229-5412 or Joe Johnston of this office at (817) 885-7830 for additional information on compliance of such activities with the Endangered Species Act.

Sincerely,

Robert M. Short
Field Supervisor

Enclosure

cc: Law Enforcement, FWS, San Antonio, TX
Regional Director, FWS, Albuquerque, NM (FWE/HC)
Regional Solicitor, USDI, Tulsa, OK

United States Department of the Interior

FISH AND WILDLIFE SERVICE

611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

Marge Krueger
6208 Shadow Mountain Drive
Austin, Texas 78731

Dear Ms. Krueger:

This responds to our telephone conversation of June 7, 1993, requesting that this office reevaluate the following property for its suitability as habitat for federally listed threatened or endangered species:

Lot in Jester Point, Phase I, or 7101 Foxtree Cove,
Austin, Travis County, Texas

We have reviewed the information you provided as well as other available information concerning the potential of the above property to provide suitable habitat for the federally listed endangered golden-cheeked warbler, black-capped vireo and cave invertebrates.

We believe this property would be suitable habitat for the federally listed endangered golden-cheeked warbler and/or the cave invertebrates. We believe that clearing or development-related activities of this acreage would constitute a "take" as defined by Endangered Species Act (Act). The Act prohibits the "take" of a federally listed species unless the "take" is incidental to an otherwise lawful activity and a section 10 (a)(1)(B) permit under the Act has been obtained. Therefore, our biological evaluation of development on the subject lot and compliance with the Act remains unchanged.

We appreciate your concern for endangered species and your desire to comply with the Endangered Species Act. This response is intended to assist you in such compliance. You are ultimately responsible for compliance with all laws, and this letter does not exempt you from complying with current or future federal, state, regional, or local development requirements. If you wish to discuss this further, please contact Alma Barrera at 512-482-5436.

Sincerely,

Sam D. Hamilton
State Administrator

United States Department of the Interior

FISH AND WILDLIFE SERVICE

611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

June 24, 1993

Phil Frazier
Horizon Environmental Services, Inc.
P.O. Box 162017
Austin, Texas 78746

Dear Mr. Frazier:

This responds to your letter, dated May 24, 1993, requesting this office review the following property for its suitability as habitat for federally listed threatened or endangered species:

O.321 acres located on Lakeview Drive in Comanche
Trail Subdivision, Travis County, Texas.

We have reviewed the information you provided as well as other available information concerning the potential for the above property to provide suitable habitat for the federally listed endangered golden-cheeked warbler, black-capped vireo and cave invertebrates. We believe this property would not provide suitable habitat for the black-capped vireo and the cave invertebrates, but would provide suitable habitat for the golden-cheeked warbler.

Our records indicate that golden-cheeked warblers have been observed on the periphery of this property. Current biological information indicates the warbler is sensitive to several factors associated with residential development, including increases in noise levels, predators, human activity

in nesting areas, and other disturbance factors. We believe that clearing or development-related activities of this area, would constitute a "take" as defined by the Endangered Species Act (Act). The Act prohibits "take" unless it is incidental to an otherwise lawful activity and been authorized under section 7 or section 10(a)(1)(B) of the Act. Therefore, construction in this area would require authorization under the Act.

We appreciate your concern for endangered species and your desire to comply with the endangered Species Act. This response is intended to assist you in such compliance. You are ultimately responsible for compliance with all laws, and this letter does not exempt you from complying with current or future federal, state, regional, or local development requirements. If you wish to discuss this further, please contact Alma Barrera at (512) 482-5436.

Sincerely,

Sam D. Hamilton
State Administrator

United States Department of the Interior

FISH AND WILDLIFE SERVICE

611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

December 3, 1993

Keith E. Young
KEY Group Engineering
3701 Bee Caves Road, Suite 102
Austin, Texas 78746

Dear Mr. Young:

This responds to your letter, dated August 31, 1993, requesting this office review the following property for its suitability as habitat for federally listed threatened or endangered species:

Part of 25.4 area tract located 4.1 miles from 1431
off Lime Creek Road, Travis County, Texas

We have reviewed the information you provided as well as other available information concerning the potential for the above property to provide suitable habitat for the federally listed endangered golden-cheeked warbler, black-capped vireo and cave invertebrates. We believe this property would provide suitable habitat for the golden-cheeked warbler, the black-capped vireo and/or the cave invertebrates.

The subject tract is part of a large tract occupied by golden-cheeked warbler, black-capped vireo and/or the cave invertebrates. Additionally, areas that are biologically necessary for the continued existence of a

species may not be continuously occupied by that species. Current biological information indicates the warbler and vireo are sensitive to several factors associated with residential development, including increases in noise levels, predators, human activity in nesting areas, and other disturbance factors. We believe that clearing or development-related activities of this area, would constitute a "take" as defined by the Endangered Species Act (Act). The Act prohibits "take" unless it is incidental to an otherwise lawful activity and been authorized under section 7 or section 10(a)(1)(B) of the Act. Therefore, construction in this area would require authorization under the Act.

We appreciate your concern for endangered species and your desire to comply with the Endangered Species Act. This response is intended to assist you in such compliance. You are ultimately responsible for compliance with all laws, and this letter does not exempt you from complying with current or future federal, state, regional, or local development requirements. If you wish to discuss this further, please contact Alma Barrera at (512) 482-5436.

Sincerely,

/s/ Jana Grote

Sam D. Hamilton
State Administrator

Enclosure

United States Department of the Interior

FISH AND WILDLIFE SERVICE

611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

January 13, 1994

Patrick Noack
2000 Yaupon Valley Road
Austin, Texas 78746

Dear Mr. Noack:

It has come to our attention that clearing and construction activities associated with residential development are occurring on a 23-acre tract located off Yaupon Valley Road in Westlake Hills, Travis County, Texas. Information received from the Travis County Tax Appraisal District indicates that you are the owner of this property.

The Fish and Wildlife Service (Service) has reviewed this property for endangered species concerns in a letter, dated June 10, 1992, (see enclosed copy). In this letter, based on biological surveys provided by Horizon Environmental Services and other information available at that time, our agency advised that development of this tract would require a permit for "incidental taking" under section 10(a)(1)(B) of the Endangered Species Act (Act). Further development of this property would be prohibited under section 9 of the Act. We are providing information on this section 10(a)(1)(B) permitting process for your information.

Provisions of the Act prohibit unauthorized take of endangered species listed under the Act. "Take" is defined as activities that harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such a conduct. "Harm" in this definition includes the disturbance or destruction of habitat occupied by the species or necessary for its recovery. Activities that could affect the warbler include clearing, construction, or change in flora or fauna of areas in or adjacent to habitat.

The Service recommends no further development activities occur on this lot and that all construction and vegetation clearing stop immediately. Failure to stop these activities immediately could result in a violation of the Act and possible criminal or civil actions that could result in fines and/or imprisonment.

Should you have any questions regarding the determination on this property, or would like to have a meeting concerning this property and the section 10(a)(1)(B) permitting process, please contact Bob Simpson at 512/482-5436.

Sincerely,

/s/ Joseph E. Johnston

Sam D. Hamilton
State Administrator

United States Department of the Interior

FISH AND WILDLIFE SERVICE

611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

January 13, 1994

Jerri Garner
25613 River Fern Court
Leander, Texas 78641

Dear Ms. Garner:

This letter is in reference to recent clearing activities on the property across River Fern Court from your horse stable operations near Leander, in Williamson County, Texas. This property supports vegetation that is possibly occupied by the federally listed endangered golden-cheeked warbler. According to our files, golden-cheeked warblers have been sighted on adjacent properties in similar habitat, and are very likely present on your property close to the area that has been cleared.

If the activities taking place on the subject site are in any way disrupting the breeding and/or foraging activities of the federally protected golden-cheeked warbler, these activities would constitute a "take" of listed species. Take of listed species is prohibited under section 9 of the Endangered Species Act (Act) and must be avoided or authorized under section 7 or section 10 of the Act.

The term "take" means to harass, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such conduct. "Harm" in this

definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. "Incidental taking," authorized under section 7 or 10 of the Act, means any taking otherwise prohibited, if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

Based on aerial photographs, and other information available to this office, we recommend that clearing activities on the property be discontinued and a biological survey be performed by qualified biologists to determine if this habitat is currently being utilized by golden-cheeked warblers. This would help you, and our office, determine if further development of this site would require authorization under the Act. Please see the appropriate enclosures for minimal survey requirements for the golden-cheeked warbler.

If you have further questions regarding the ecology of the golden-cheeked warbler, of the Act, please contact Bob Simpson of my staff at (512) 482-5436.

Sincerely,

/s/ Jana Grote

/s/ Joseph E. Johnston

Sam D. Hamilton
State Administrator

cc: Jean Nance

United States Department of the Interior

FISH AND WILDLIFE SERVICE

611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

January 13, 1994

Austin Americana Enterprises
Rex Bohls
1301 S IH-35
Austin, Texas 78741

Dear Mr. Bohls:

It has come to our attention that clearing and construction activities associated with residential development are occurring on a 473 acre tract of land known as the Friendship Ranch in Hays County, Texas. Information received from the Hays County Tax Appraisal District indicates that you are the owner of this property.

The Fish and Wildlife Service reviewed this property in a letter to the Doug Hodge Company on October 16, 1991, for endangered species concerns (see enclosure). In that letter we stated that, based on aerial photographs and other data available to this office, the property could provide suitable habitat for the federally listed and protected golden-cheeked warbler (*Denroica chrysoparia*). We also included information regarding minimal survey (warblers) using the property.

Provisions of the Act prohibit unauthorized take of endangered species listed under the Act. "Take" is defined as activities that harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such a conduct. "Harm" in this definition includes the disturbance or destruction of habitat occupied by the species or necessary

for its recovery. Activities that could affect the warbler include clearing, construction, or change in flora or fauna of areas in or adjacent to habitat.

We have not received any information, since that correspondence, to change our determination that the subject property could provide suitable habitat for the warbler. If there are warblers present on this property, development could require a permit for "incidental taking" under section 10(a)(1)(B) of the Endangered Species Act (Act). We are providing information on the section 10(a)(1)(B) permitting process for your consideration and urge you to contact this office for further assistance on how to comply with the Act.

Should you have any questions regarding this property, or would like to schedule a meeting concerning this property and the section 10(a)(1)(B) permitting process, please contact Bob Simpson at 512/482-5436.

Sincerely,

/s/ Joseph E. Johnston

Sam D. Hamilton
State Administrator

Enclosure

cc: Alex Hasychak, FWS, Special Agent, Law Enforcement

United States Department of the Interior

FISH AND WILDLIFE SERVICE

611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

January 25, 1994

Lee Sherrod
Horizon Environmental Services, Inc.
P.O. Box 162017
Austin, Texas 78716

Dear Mr. Sherrod:

This responds to your fax, dated September 17, 1993, requesting that this office evaluate the following property for its suitability as habitat for federally listed threatened or endangered species:

Two tracts on River Hills Road off FM 2244 (Bee Caves Road),
Austin, Travis County, Texas

We have reviewed the information on the 1991 and 1993 surveys you provided as well as other available information concerning the potential for the above property to provide suitable habitat for the federally listed endangered golden-cheeked warbler, black-capped vireo and cave invertebrates. We believe that this property would not provide suitable habitat for the black-capped vireo or the cave invertebrates, but could provide suitable habitat for the golden-cheeked warbler.

Because of sightings on or adjacent to these tracts, we believe that clearing or development related activities on this acreage would constitute a "take" as defined by Endangered Species Act (Act). The Act prohibits the "take"

of a federally listed species unless the "take" is incidental to an otherwise lawful activity and section 7 or section 10(a)(1)(B) permit under the Act has been obtained. Therefore, development of this acreage would require authorization under the Act.

Thank you for providing pertinent information regarding this evaluation. This response is intended to assist you in such compliance. You are ultimately responsible for compliance with all laws, and this letter does not exempt you from complying with current or future federal, state, regional or local development requirements. If you wish to discuss this further, please contact Alma Barrera at (512) 482-5436.

Sincerely,

/s/ Jana Grote

Sam D. Hamilton
State Administrator

Enclosure

cc: City of Austin, Conservation & Environmental Department
City of Austin, Electric Department
Jim Nuckles, Travis County Tax Appraisal District

United States Department of the Interior

FISH AND WILDLIFE SERVICE

611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

April 14, 1994

Lee Sherrod
Horizon Environmental Services, Inc.
P.O. Box 162017
Austin, Texas 78716

Dear Mr. Sherrod:

This responds to your letter dated March 4, 1994, requesting this office review the following property for its suitability as habitat for federally listed threatened or endangered species:

Painted Bunting Subdivision, Austin, Travis County, Texas

We have reviewed the information you provided as well as other available information concerning the potential of the above property to provide suitable habitat for the federally listed endangered golden-cheeked warbler, black-capped vireo and cave invertebrates. Based on current biological information, we do not believe that this property would provide suitable habitat for the black-capped vireo or the cave invertebrates, but would provide habitat for the golden-cheeked warbler.

Your bird survey indicates that two golden-cheeked warblers were observed in the canyon. Current information indicates the warbler is

sensitive to several factors associated with residential development, including increases in noise levels, predators, human activity in nesting areas, and other disturbance factors. Therefore, we believe that clearing or development-related activities on Lots 6-13, would constitute a "take" as defined by the Endangered Species Act. The Act prohibits the "take" unless it is incidental to an otherwise lawful activity and section 10(a)(1)(B) permit under the Act has been obtained. Therefore, construction of residences on these lots would require authorization under the Act.

However, construction on Lots 1-4 and 14-15 (drawing enclosed) would not require authorization under the Act if the following conservation measures are incorporated in the construction.

1. Remove only those trees and shrubs necessary for construction of driveway, septic tank and house.
2. Confine the development activities on the front 200 feet of the lot.
3. Use only native plant species for landscaping.
4. Confine exterior construction activities so that it occurs outside the breeding season for the golden-cheeked warbler (breeding period is from March 1 through August 1), so as to avoid disruption of breeding behavior.

We believe that destruction of the habitat located beyond the front 200 feet of the lot could result in a "take" of the endangered golden-cheeked warbler and thus, require authorization under the Act.

We appreciate your concern for endangered species and your desire to comply with the Act. This response is intended to assist you in such compliance. However, you are ultimately responsible for compliance with all laws, and this letter cannot assure you complete protection from any future liability or exempt you from any current or future federal, state,

regional or local development requirements. If you wish to discuss this matter further, please contact Alma Barrera at (512) 482-5436.

Sincerely,

Field Supervisor

Enclosure

cc: City of Austin, Conservation & Environmental Department
City of Austin, Electric Department
Jim Nuckles, Travis County Tax Appraisal District

United States Department of the Interior

FISH AND WILDLIFE SERVICE

611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

September 23, 1994

Fran & Larry Collmann
9911 Anderson Mill Road
Austin, Texas 78750

Dear Mr. & Mrs. Collmann:

This responds to your letter, dated September 19, 1994, requesting this office re-evaluate the 13.942 acres located near Spicewood Springs Road and Loop 360 off White Cliff Dr., Austin, Travis County, Texas property. We have re-evaluated the new information you provided.

As stated in our letter June 1, 1994, our records indicate that golden-cheeked warblers have been sighted on the western, southern and eastern boundaries of this property. Mr. Lee Sherrod's letter to you of June 13, 1994, indicated the possibility of black-capped vireos in the area. Current information indicates the warbler and vireo are sensitive to several factors associated with residential development, including increases in noise levels, predators, human activity in nesting areas, and other disturbance factors. Therefore, we believe that clearing or development-related activities on the majority of this tract, could constitute a "take" as defined by the Endangered Species Act. The Act prohibits "take" unless it is incidental to an otherwise lawful activity and has been authorized under section 10(a)(1)(B) of the Act. We recommend that authorization under the Act be secured prior to any development.

However, we also said, there may be a possibility of building a single house on the 13.942 acres without constituting "take" if the following conditions are observed. We wish to reiterate that this property is very close to habitat that is occupied by the golden-cheeked warbler and/or black-capped vireo. To avoid harassment (a possible "take" violation) of the species that may occur in the area, we wish to recommend the following conservation measures:

1. Construction of only one single family home on the northeast portion of the property, the area which is already cleared.
2. The driveway be constructed in the already cleared roadway.
3. Exterior construction activities on this property not occur between March 1 and August 1.
4. Remove only the trees that are needed for construction of the house and septic field.
5. Use only native plants and grasses for landscaping.
6. Ensure that all clearing and construction operations are consistent with current practices of the Texas Forest Service to prevent the spread of oak wilt.
7. Prohibit the use of pesticides, herbicides and fertilizers.

If these conservation recommendations are not followed, then we believe a take could occur and recommend obtaining authorization under section 10(a)(1)(B) or section 7 of the Endangered Species Act. Section 10(a)(1)(B) permit procedures are enclosed.

Thank you for providing pertinent information to help re-evaluate this property. If you wish to discuss this matter further, please contact Alma Barrera at (512) 482-5436.

Sincerely,

/s/ Jana Grote
Field Supervisor

Enclosure

cc: City of Austin, Conservation & Environmental
Department
City of Austin, Electric Department
Jim Nuckles, Travis County Tax Appraisal District

United States Department of the Interior

FISH AND WILDLIFE SERVICE

611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

January 13, 1994

Glenn Williams and Terry Wynn, Partners
P.O. Box 64138
Lubbock, Texas 79464

Gentlemen:

This letter is in reference to recent vegetation clearing activities on 611.208 acres of your property located near Spanish Pass Road and Tower Road in Kendall County, Texas. This property supports vegetation that is likely to be occupied by the federally listed endangered golden-cheeked and/or black-capped vireo.

If the development activities on the subject site are in any way disrupting the breeding and/or foraging activities of the federally protected golden-cheeked warbler and/or black-capped vireo, these activities could constitute a "take" of listed species.

The Endangered Species Act (Act) prohibits the "take" of federally-listed species unless the "take" is incidental to otherwise lawful activity and a section 10(a)(1)(B) permit under the Act has been obtained. "Take" is defined as harass, harm, pursue, hunt, shot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

We recommend that clearing activities on the property be discontinued and you contact Alma Barrera for additional information on compliance of such activities with the Act at (512) 482-5436.

Sincerely,

/s/ Joseph E. Johnston

Field Supervisor

cc: Regional Director, Region 2
Solicitor, Department of the Interior, Tulsa, OK
Fish and Wildlife Service, Law Enforcement, San Antonio, TX

United States Department of the Interior

FISH AND WILDLIFE SERVICE

611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

June 9, 1994

Stan & Donna Buck
305 Golden Oaks Drive
Georgetown, Texas 78628

Dear Mr. & Mrs. Buck:

This responds to your letter, dated March 23, 1994, requesting this office to review the following property for its suitability as habitat for federally listed threatened or endangered species:

Lot 8, Lake Georgetown Estates II, located on County
Road 262, Georgetown, Williamson County, Texas

We have reviewed the information you provided as well as other available information concerning the potential of the above property to provide suitable habitat for the federally listed endangered golden-cheeked warbler, black-capped vireo and cave invertebrates. We believe that this property would not provide suitable habitat for the black-capped vireo or the cave invertebrates, but would provide habitat for the golden-cheeked warbler.

The subject lot is part of a block of habitat occupied by the golden-cheeked warbler. Areas that are biologically necessary for the continued existence of a species may not be continuously occupied by that species. Current

biological information indicate the warbler is sensitive to several factors associated with residential development, including increases in noise levels, predators, human activity in nesting areas, and other disturbance factors. We believe that clearing or development-related activities in this area, would constitute a "take" as defined by the Endangered Species Act (Act). The Act prohibits the "take" unless it is incidental to an otherwise lawful activity and has been authorized under section 10(a)(1)(B) of the Act. We recommend that authorization under the Act be secured prior to any development. Procedures for the section 10(a)(1)(B) permit process are enclosed.

We appreciate your concern for endangered species and your desire to comply with the Endangered Species Act. This response is intended to assist you in such compliance. You are ultimately responsible for compliance with all laws, and this letter does not exempt you from complying with current or future federal, state, regional or local development requirements. If you wish to discuss this matter further, please contact Alma Barrera at (512) 482-5436.

Sincerely,

Field Supervisor

United States Department of the Interior

FISH AND WILDLIFE SERVICE

611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

September 22, 1994

Lee Sherrod
Horizon Environmental Services, Inc.
P.O. Box 162017
Austin, Texas 78716

Dear Mr. Sherrod:

This responds to your letter, dated June 28, 1994, regarding the re-evaluation of the HE Brodie tract, located Barton Creek Loop 360, Lamar and Ben White Blvd., Austin, Travis County, Texas.

Our records indicate that golden-cheeked warblers have been observed along the Barton Creek greenbelt adjacent to this property and some observations along the property line. The subject tract is part of a large tract occupied by golden-cheeked warblers. Additionally, areas that are biologically necessary for the continued existence of a species may not be continuously occupied by that species. Current biological information indicates the warbler is sensitive to several factors associated with development, including increases in noise levels, predators, human activity in nesting areas, and other disturbance factors.

We believe that clearing or development-related activities on part of this property (the water quality buffer and transition zones), could constitute a "take" as defined by the Endangered Species Act (Act). The Act prohibits "take" unless it is incidental to an otherwise lawful activity and has been authorized under section 10(a)(1)(B) of the Act.

As discussed during our meeting of July 12, we believe some development can occur outside the City of Austin water quality buffer and transition zones, 800 feet from the middle of Barton Creek, without constituting "take" if the following conditions are observed.

1. Exterior construction activities within 1000 feet from the middle of the creek not occur between March 1 and August 1.
2. Remove only trees that are needed for construction.
3. Use only native plants and grasses for landscaping.
4. Ensure that all clearing and construction operations are consistent with current practices of the Texas Forest Service to prevent the spread of oak wilt.

If these conservation recommendations are not followed, then we believe a take could likely occur and we recommend obtaining authorization under section 10(a)(1)(B) or section 7 of the Endangered Species Act.

We appreciate your concern for endangered species and your desire to comply with the Act. If you wish to discuss this matter further, please contact Alma Barrera at (512) 482-5436.

Sincerely,

/s/ Jana Grote
Field Supervisor

Enclosure

cc: City of Austin, Environmental & Conservation Services
Dept. City of Austin, Power & Light
Jim Nuckles, Travis County Tax Appraisal District

18
No. 95-813

Supreme Court, U. S.

FILED

MAY 24 1996

CLERK

In The
Supreme Court of the United States

October Term, 1995

BRAD BENNETT, et al.,

Petitioners,

v.

MARVIN PLENERT, et al.,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

**BRIEF AMICUS CURIAE OF THE ASSOCIATION
OF CALIFORNIA WATER AGENCIES, THE
STATE WATER CONTRACTORS, AND THE
CENTRAL VALLEY PROJECT WATER ASSOCIATION
IN SUPPORT OF PETITIONERS**

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QUESTIONS PRESENTED

The "Citizens Suit" provision of the Endangered Species Act of 1973 (16 U.S.C. § 1540(g)(1)) provides "any person" may commence a civil suit on his own behalf to enjoin the United States, or any other governmental instrumentality or agency, from violating the provisions of the Act or regulations issued thereunder. The questions presented are:

1. Whether standing under the Citizens Suit provision of the Endangered Species Act is subject to a zone of interests test as a further, judicially imposed, prudential limitation on standing;
2. If standing to sue under the Endangered Species Act is subject to prudential limitations, whether those limitations restrict standing to litigants who assert an interest in the preservation of endangered species to challenge government conduct alleged to violate the terms of the Act.

TABLE OF CONTENTS

	Page(s)
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
DECISION BELOW	1
INTEREST OF <i>AMICI</i>	1
STATEMENT OF THE CASE	5
SUMMARY OF ARGUMENT	8
ARGUMENT	10
I. THE COURT OF APPEALS' APPLICATION OF THE ZONE OF INTERESTS TEST UNNECESSARILY INFRINGES ON THE FUNDAMENTAL RIGHT TO PETITION GOVERNMENT	10
II. APPLICATION OF THE ZONE OF INTERESTS TEST FRUSTRATES CONGRESSIONAL POLICY CONCERNING DEFERENCE TO STATE REGULATION OF WATER RESOURCES	13
III. PRUDENTIAL STANDING IS INAPPLICABLE TO PETITIONERS WHO STOOD IN PLACE OF THE AGENCY DIRECTLY REGULATED	17
IV. THE ZONE OF INTERESTS TEST SHOULD CONSIDER AN ACT OF CONGRESS AS A WHOLE RATHER THAN RELY ON JUDICIAL INTERPRETATION OF AN ACT'S PRIMARY PURPOSE	19

TABLE OF CONTENTS - Continued

	Page(s)
V. THE COURT OF APPEALS' APPLICATION OF THE ZONE OF INTERESTS TEST CONFLICTS WITH CONGRESSIONAL POLICY AFFORDING BROAD ACCESS TO THE JUDICIARY	23
CONCLUSION	25

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Association of Data Processing Service Org., Inc. v. Camp</i> , 397 U.S. 150 (1970).....	9, 23, 24
<i>Babbitt v. Sweet Home Chapter of Commun. for a Great Or.</i> , ___ U.S. ___, 115 S. Ct. 2407 (1995)	19
<i>Bennett v. Aenert</i> , 63 F.3d 916 (9th Cir. 1995)	passim
<i>Bennett v. Plenert</i> , ___ U.S. ___, 116 S. Ct. 1316 (1996)	8
<i>California Motor Transport Co. v. Trucking Unlimited</i> , 404 U.S. 508 (1972)	11
<i>California v. United States</i> , 438 U.S. 645 (1978)	3
<i>Chambers v. Baltimore & Ohio, R.R.</i> , 207 U.S. 142 (1907)	12
<i>Clarke v. Securities Industry Association</i> , 479 U.S. 388 (1987)	9, 25
<i>Gladstone, Realtors v. Village of Bellwood</i> , 441 U.S. 91 (1979)	8, 9, 23
<i>Ickes v. Fox</i> , 300 U.S. 82 (1937)	18
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992)	19
<i>Massachusetts Board of Retirement v. Murgia</i> , 427 U.S. 307 (1976)	12
<i>Middlesex County Sewage Auth. v. National Sea Clammers Association</i> , 453 U.S. 1 (1981)	24
<i>Nevada v. United States</i> , 463 U.S. 110 (1983)	18
<i>Pacific Northwest Generating Cooperative v. Brown</i> , 38 F.3d 1058 (9th Cir. 1994)	11

TABLE OF AUTHORITIES - Continued

Page(s)

<i>PUD No. 1 v. Washington Dept. of Ecology</i> , ___ U.S. ___, 114 S. Ct. 1900 (1994)	14
<i>Rodriguez v. U.S.</i> , 480 U.S. 522 (1987)	19, 22
<i>Romer v. Evans</i> , ___ U.S. ___, 1996 WL 262293 (1996)	13
<i>Skinner v. Oklahoma ex rel. Williamson</i> , 316 U.S. 535 (1942)	13
<i>Sweatt v. Paitner</i> , 339 U.S. 629 (1950)	12
<i>Trafficante v. Metropolitan Life Ins. Co.</i> , 409 U.S. 205 (1972)	23
<i>United States v. Alpine Land and Reservoir Co.</i> , 503 F. Supp. 877 (D. Nev. 1980)	18
<i>United States v. Batchelder</i> , 442 U.S. 114 (1979)	13
<i>United States v. Menasche</i> , 348 U.S. 528 (1955)	22
<i>Wayte v. United States</i> , 470 U.S. 598 (1984)	12

STATUTES

16 U.S.C. § 1531 et seq.	3
16 U.S.C. § 1531(c)(2)	14, 22
16 U.S.C. § 1533(b)(2)	7, 20
16 U.S.C. § 1536(a)(2)	6
16 U.S.C. § 1536(b)(3)(A)	22
16 U.S.C. § 1540(g)(1)	6, 13
42 U.S.C. § 2000e-5	23
42 U.S.C. § 3610	23

TABLE OF AUTHORITIES - Continued

	Page(s)
42 U.S.C. § 3612.....	23
43 U.S.C. § 372.....	17, 18
43 U.S.C. § 383.....	14
Endangered Species Act, 1982 Amendments, Pub. L. No. 97-304, § 9(a)(2), 96 Stat. 1426	14
Cal. Water Code § 1243.....	3
Cal. Water Code § 1243.5	3
Cal. Water Code § 1257.5	3

MISCELLANEOUS

50 C.F.R. § 17.11.....	3
128 Cong. Rec. 13,183 (1982).....	15
H.R. Rep. No. 412, 93rd Cong., 1st Sess. (1973).....	24
H.R. Rep. No. 1625, 95th Cong., 2d Sess. (1978), reprinted in 1978 U.S.C.C.A.N. 9453	21
S. Rep. No. 418, 97th Cong., 2d Sess. (1982).....	15
<i>Recording Indicates Rancher, Not Agents, Aggressive,</i> THE IDAHO STATESMAN, Sept. 14, 1995.....	10
<i>This Land is Whose Land?</i> TIME, Oct. 23, 1995	10
<i>Unrest in the West</i> , TIME, Oct. 23, 1995.....	10
CHARLES WRIGHT, ARTHUR MILLER & EDWARD COOPER, FEDERAL PRACTICE AND PROCEDURE (2d ed. 1984).....	23
A. Dan Tarlock, <i>The Endangered Species Act and Western Water Rights</i> , 20 LAND AND WATER LAW REVIEW (1985).....	10, 16

TABLE OF AUTHORITIES - Continued

	Page(s)
Rules of the Supreme Court of the United States, Rule 37.3.....	1
Western States Water Issue No. 535 (Aug. 17, 1984)	16

DECISION BELOW

The decision of the United States Court of Appeals for the Ninth Circuit, *Bennett v. Plenert*, is reported at 63 F.3d 915 (9th Cir. 1995).

INTEREST OF AMICI

Pursuant to Rule 37.3 of the Rules of the Supreme Court of the United States, the Association of California Water Agencies, the State Water Contractors, and the Central Valley Project Water Association respectfully submit this brief *amicus curiae* in support of Petitioners. Consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

The people of the State of California are highly dependent upon an intricate network of highly developed water projects to convey water to their cities and farms. This dependence arises from a geographical imbalance of supply and demand. Roughly 75 percent of California's water resources are found north of the Sacramento/San Joaquin River Delta, while approximately 75 percent of the urban and agricultural water demand within California occurs south of the Delta. To deal with this geographical imbalance, both the state and federal governments have constructed water projects which transfer water from where it is found to where it is consumptively used. Together, the State Water Project, an element of the State Water Development System ("State Water System"), and the federal Central Valley Project provide water to more than two-thirds of California's urban population and the

vast majority of its farmland. The Sacramento/San Joaquin River Delta is a critical link in the conveyance of California's water from the north to the south.

Amicus, Association of California Water Agencies ("ACWA"), is a non-profit, incorporated association comprised of 420 local public agencies which supply and manage California's water resources. These agencies supply water, at the wholesale or retail level, or both, to nearly all urban households in California and to more than 8 million acres of farmland. ACWA members also provide flood control for millions of Californians and manage many of the State's groundwater basins. Many of the members of ACWA receive their water supply directly or indirectly from the State Water System, from the federal Central Valley Project, or from the federal Colorado River Basin Project.

Amicus, State Water Contractors ("Contractors"), is a non-profit, incorporated association comprised of 27 public agencies formed under the laws of the State of California. Each of the member agencies holds a contract with the State of California to receive water from the State Water System. By means of these contracts, the State Water System supplies water to some 21 million urban residents and nearly a million acres of farmland.

Amicus, Central Valley Project Water Association ("CVPWA"), is a non-profit, incorporated association comprised of 80 public agencies formed under the laws of the State of California. Each of the member agencies holds a contract with the United States Department of Interior, Bureau of Reclamation, to receive water from the

federal Central Valley Project. By means of these contracts, the Central Valley Project provides 4 million households and 3 million acres of farmland with all, or a portion, of their water supply.

Historically, the balance between distribution for consumptive use by water users, on the one hand, and the allocation of water for environmental maintenance or enhancement, on the other, was determined by provisions of water right permits or licenses issued by the State of California. See *California v. United States*, 438 U.S. 645 (1978); see also California Water Code §§ 1243, 1243.5 and 1257.5. More recently, however, the operations of the water projects, particularly the State Water System, the Central Valley Project, and the Colorado River Basin Project, and thus, the balance between consumptive and environmental water use, have been significantly affected by directives of the United States Fish and Wildlife Service and National Marine Fisheries Service under authority of the federal Endangered Species Act ("Act"), 16 U.S.C. § 1531 *et seq.*

This fundamental shift in regulatory authority results from the fact that the Sacramento/San Joaquin River Delta and the Colorado River provide habitat for numerous aquatic species listed under the Act. In particular, the winter-run chinook salmon, an anadromous species listed as endangered, 50 C.F.R. § 17.11, uses the Delta as part of its migration corridor to and from the Pacific Ocean. The delta smelt, listed as a threatened species, *id.*, is largely resident within the Delta year round. Four native fish species that inhabit the Colorado River are also listed as endangered under the Act: the Colorado

squawfish, the humpback chub, the bonytail chub, and the razorback sucker. *Id.*

Based upon the conclusions of the United States Fish and Wildlife Service and the National Marine Fisheries Service regarding requirements for the preservation of these species, the operational standards and criteria for the water projects have been radically altered. As a result of these changes, the water supply available to California's cities and farms has been significantly reduced, and the ability of *Amici* to meet the water supply needs of their constituents has been directly impaired.

California also provides habitat for many terrestrial species listed as threatened or endangered under the Act. Actions taken to protect these species also affect the operations of agencies which comprise *Amici*. For example, in the San Joaquin Valley of California, routine activities to maintain water conveyance facilities are disrupted or precluded because those activities may harm the habitat of the San Joaquin kit fox or Tipton kangaroo rat which are listed as endangered. *Id.* Similar activities are affected in the Sacramento Valley of California in order to prevent harm to the giant garter snake which is listed as threatened. *Id.*

In addition to receiving water from the State Water System, the Central Valley Project, or the Colorado River Basin Project, many member agencies of ACWA, CVPWA, or the Contractors, have constructed, or are constructing, their own water projects. Regulation under the Act has significantly affected these efforts. For example, the Metropolitan Water District of Southern California, a member of ACWA and the State Water Contractors, was required

to purchase and set aside substantial acreage in connection with its construction of the Domenigoni Valley Reservoir in order to provide habitat for the least Bells vireo and other listed species. Similarly, Contra Costa County Water District, a member of ACWA and the CVPWA, was required to create an endangered species reserve in connection with its construction of the Los Vaqueros Reservoir Project in the Sacramento/San Joaquin Delta.

These are only a few examples of the Act's impact on *Amici*, its member agencies and all those served by these agencies. As of June 1993, California provided habitat to 109 species listed as endangered or threatened pursuant to the Act and 48 species proposed for listing. Consequently, regardless of the region of California in which a member agency of either ACWA, the Contractors, or CVPWA finds itself, its water supply or operations are likely to be affected by efforts undertaken to protect species listed as endangered or threatened under the Act.

STATEMENT OF THE CASE

Petitioners are ranchers and irrigation districts which receive water from the Klamath Project, operated by the United States Bureau of Reclamation ("Bureau"). See Complaint, ¶¶ 5, 9. As a result of a consultation between the Bureau and the United States Fish and Wildlife Service pursuant to Section 7 of the Act, water in two Klamath Project reservoirs that the Bureau would have otherwise allocated to Petitioners was maintained in the reservoirs. The purpose of maintaining this excess water was purportedly to avoid jeopardy to the Lost River

sucker and the shortnose sucker, which were listed as endangered in 1988. Complaint, ¶¶ 10, 14-19, 21.

Petitioners filed suit against Respondents, the Secretary of Interior, and Fish and Wildlife officials, pursuant to the Citizens Suit provision of the Act.¹ In their Complaint, Petitioners alleged that Respondents violated the Act by: (1) determining under Section 7(a)(2) of the Act² that the proposed operation of the project would result in jeopardy to the fish, and that restrictions should be imposed on withdrawals for irrigation, without data to support those conclusions and in the face of information

¹ Section 11(g)(1), 16 U.S.C. § 1540(g)(1) provides, in pertinent part:

Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf -

(A) to enjoin any person, including the United States . . . , who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof. . . .

² Section 7(a)(2), 16 U.S.C. § 1536(a)(2), provides, in pertinent part:

Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical, unless such agency has been granted an exemption for such action. . . . In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

suggesting that fish populations were stable;³ and (2) by issuing a biological opinion which, by setting forth hydrologic requirements in reservoirs where the suckers live, implicitly determined "critical habitat" for the fish under Section 4 of the Act without considering the economic impacts of that critical habitat designation, as required under Section 4(b)(2) of the Act. Complaint, ¶¶ 22, 31.⁴

The United States District Court for the District of Oregon granted Respondents' Motion to Dismiss based upon Petitioners' lack of prudential standing, and the United States Court of Appeals for the Ninth Circuit affirmed the dismissal.

In its opinion, the Court of Appeals rejected Petitioners' contention that the prudential "zone of interests" test was rendered inapplicable by the Act's Citizens Suit provision. 63 F.3d at 918. The Court held that Petitioners failed the "zone of interests" test because "only plaintiffs who allege an interest in the *preservation* of endangered species fall within the zone of interests protected by the ESA." *Id.* at 919 (emphasis in original). The Court concluded that only species preservation interests satisfy the "zone of interests" test because "[t]he overall purposes of

³ Complaint ¶¶ 9-21, 24-29.

⁴ Section 4(b)(2), 16 U.S.C. § 1533(b)(2) provides, in pertinent part:

The Secretary shall designate critical habitat . . . on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat.

the ESA are singularly devoted to the goal of ensuring species preservation; they do not embrace the economic and recreational interests that underlie the [Petitioners'] challenge." *Id.* at 920. Because Petitioners use project water for irrigation and recreation, not species preservation, the Court concluded that Petitioners were asserting a "competing interest" in the water which was "inconsistent with the Act's purposes." *Id.* at 921. Finally, the Court concluded that, notwithstanding the mandate of Section 4(b)(2) requiring the Secretary to consider the economic impacts of designating critical habitat, Congress "did not intend impliedly to confer standing on every plaintiff who could conceivably claim that the failure to consider one of those factors adversely affected him." *Id.*

This Court granted Petitioners' Petition for Writ of Certiorari on March 25, 1996. *Bennett v. Plenot*, ___ U.S. ___, 116 S. Ct. 1316 (1996).

SUMMARY OF ARGUMENT

Pursuant to the "standing" requirements of Article III of the United States Constitution, "the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979). In addition to the requirements of Article III, the judiciary has established "prudential" limits on standing. *Id.* Included among these prudential limitations is the "zone of interests" test which

was first enunciated as a standing requirement in *Association of Data Processing Service Org., Inc. v. Camp*, 397 U.S. 150 (1970). In that case, the Court held that a plaintiff seeking judicial review under the Administrative Procedure Act must demonstrate that "the interest sought to be protected by [the litigant] is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 153. However, the Court has subsequently commented that the zone of interests test "is not meant to be especially demanding." *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 399 (1987). Furthermore, "Congress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one who otherwise 'would be barred by prudential standing rules.'" *Gladstone, Realtors*, 441 U.S. at 100 (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)).

As discussed herein, the Court of Appeals' application of the zone of interest test to the Citizens Suit provision of the Act unnecessarily raises serious constitutional concerns by burdening Petitioners' First Amendment right to petition government. Rather than adhering to a narrow interpretation, a broader interpretation of standing under the Act avoids this infringement of constitutional rights, and is therefore to be preferred. In addition, in affirming the district court's dismissal, the Court of Appeals erred in finding that Petitioners were not within the Act's zone of interests since Congress expressly recognized the interests of water agencies in its 1982 amendment of the Act. These water agencies are, in reality, the entities actually regulated. Furthermore, the Court of

Appeals' reliance on the Act's "general" purpose improperly ignores the specific means and limitations as enacted by Congress. The Court of Appeals' narrow interpretation of standing under the Act, despite the broad statutory language, casts doubt on Congress' ability to allow judicial review to the full extent permitted by Article III.

ARGUMENT

I. THE COURT OF APPEALS' APPLICATION OF THE ZONE OF INTERESTS TEST UNNECESSARILY INFRINGES ON THE FUNDAMENTAL RIGHT TO PETITION GOVERNMENT.

There exists in the western United States today a growing disrespect for the federal government's management of natural resources. *Unrest in the West*, TIME, Oct. 23, 1995, at 52-66. In considerable part, this frustration has resulted from what is perceived to be the onerous and unjustified application of the Endangered Species Act. *This Land is Whose Land?* TIME, Oct. 23, 1995, at 68-71. As one commentator noted: "[w]ater development activities are now evaluated, in part, by backdoor federal water-related land use planning processes under the environmental programs that Congress has superimposed on resource development programs." A. Dan Tarlock, *The Endangered Species Act and Western Water Rights*, 20 LAND AND WATER LAW REVIEW 2 (1985). In some circumstances, this disrespect has resulted in intentional disobedience of the law without apparent concern by local law enforcement agencies. *Recording Indicates Rancher, Not Agents, Aggressive*, THE IDAHO STATESMAN, Sept. 14, 1995.

The frustration of individuals in the position of Petitioners is easily understood. In this case, ranchers and irrigation districts who are directly affected by implementation of the Act are being told that, notwithstanding the broad language in the Citizens Suit provision of the Act, they are barred from raising their grievances in court because their interests compete with those of the Lost River sucker and shortnose sucker. 63 F.3d at 921.⁵ In other words, even if the action of the Fish and Wildlife Service may be arbitrary or taken in violation of the provisions of the Act, Petitioners are barred from seeking redress for their grievances through the courts. As a consequence, the judicial system is open only to those who allege an interest in the preservation of endangered species.

Barring one side of a controversy from access to the courts should not be permitted as a matter of public policy. Nor is it permitted as a matter of constitutional law. The right of access to courts is but one aspect of the First Amendment right to petition government for redress of grievances. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). As the Court has proclaimed: "The right to sue and defend in the courts is the alternative of force. In an organized society

⁵ In deciding an action brought by hydropower operators challenging restrictions under the Act, the Ninth Circuit observed that: "[t]he plaintiffs are entitled to standing because preservation of the salmon will, in the long run, reduce their cost." *Pacific Northwest Generating Cooperative v. Brown*, 38 F.3d 1058, 1067 (9th Cir. 1994). Similarly, Petitioners arguably have an interest in restoration of the species which could therefore result in rendering the Act's restrictions unnecessary.

it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship. . . . " *Chambers v. Baltimore & Ohio, R.R.*, 207 U.S. 142, 148 (1907). Although this right is limited by principles of Article III standing, the creation of artificial barriers should be thoroughly scrutinized. See *Wayte v. United States*, 470 U.S. 598, 610 n. 11 (1984) (although the right to petition and right to free speech are separate guarantees, they are related and generally subject to the same constitutional analysis); see also *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312 (1976) (a legislative classification which burdens a fundamental right is subject to heightened scrutiny).

In another context, this Court very recently observed:

The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence. . . .

It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that *government and each of its parts remain open on impartial terms to all who seek its assistance*. " 'Equal protection of the laws is not achieved through indiscriminate imposition of inequities.' " *Sweatt v. Paitner*, 339 U.S. 629, 635 (1950) (quoting *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)). Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial

of equal protection of the laws in the most literal sense. "The guaranty of 'equal protection of the laws is a pledge of the protection of equal laws.' " *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)).

Romer v. Evans, ___ U.S. ___, slip op. at 8, 1996 WL 262293 at *18-19 (1996) (emphasis added).

Despite the broad language contained in the Citizen Suit provision of the Act, 16 U.S.C. § 1540(g)(1), the Court of Appeals opted to interpret the provision in a narrow fashion which infringes Petitioners' fundamental right to petition government for the redress of grievances. This interpretation gives rise to serious issues under the constitutional jurisprudence of this Court, and it is contrary to "the maxim that statutes should be construed to avoid constitutional questions. . . . " *United States v. Batchelder*, 442 U.S. 114, 122 (1979). Moreover, given the broad language of the Citizens Suit provision, it is difficult to see the necessity of raising this constitutional issue to implement the intent of Congress. Thus, the Court should reject the Court of Appeals' narrow interpretation and thereby avoid the need to address the serious constitutional issues raised by its holding.

II. APPLICATION OF THE ZONE OF INTERESTS TEST FRUSTRATES CONGRESSIONAL POLICY CONCERNING DEFERENCE TO STATE REGULATION OF WATER RESOURCES.

Embodied in numerous federal statutory schemes is a deference to regulation of water resources by the states. This deference is stated expressly in Section 8 of the

Reclamation Act of 1902, which provides, in pertinent part:

Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

43 U.S.C. § 383. *See also* PUD No. 1 v. Washington Dept. of Ecology, ___ U.S. ___, 114 S. Ct. 1900, 1913-1914 (1994) (Clean Water Act, 33 U.S.C. § 1251 *et seq.*, to be administered so as to avoid interference with state's water allocations).

Similar deference was expressed by Congress when it amended the Endangered Species Act in 1982. Pub. L. No. 97-304, § 9(a)(2), 96 Stat. 1426 (1982). Pursuant to these amendments, Section 2(c)(2) of the Act provides:

It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.

16 U.S.C. § 1531(c)(2). Although this statement of congressional policy was not meant to change federal or local law, through it Congress:

[R]ecogniz[ed] the individual State's interest and, very often, the regional interest with respect to water allocation. The policy statement contained in this amendment recognizes that most of the potential conflicts between species conservation and water resource development can be avoided through close cooperation between local, State and Federal authorities.

S. REP. NO. 418, 97th Cong., 2d Sess. 25 (1982). Consistent with this statement of policy, Senator Symms commented that the amendment

recogniz[es] the complex system of western water laws that govern the agriculture productivity and power-generating capacity of Western States such as my own, and was vital to the bill's acceptability. We in the West are always wary of legislation that poses feasible threats to the supremacy of the States in the appropriating of the water that is the lifeblood of our existence.

128 CONG. REC. 13,183 (1982). The Act's impact on water allocation was demonstrated during hearings before the Subcommittee on Environmental Pollution of the Senate Committee on Environment and Public Works prior to passage of the 1982 amendments. At these hearings, Roland C. Fisher, of the Colorado River Water Conservation District, testified that:

One result of the Act's inflexibility which is of real concern to us, and should be of concern to all, is the de facto interstate apportionment and intrastate appropriation of waters which the FWS [Fish and Wildlife Service] is effectively accomplishing by imposing substantial minimum flow releases on water storage projects.

For example, in order to obtain a non-jeopardy opinion on the Colorado River squawfish from FWS on its White River Dam, the State of Utah recently had to agree to release a minimum of 250 second-feet (cfs) of water at the dam during most of the year, with higher releases in the spawning period, and to augment the minimum flow by up to 5000 acre-feet from inactive storage when natural river flows fall below the 250 cfs minimum and as the matter stands now, our own sub-district's Taylor Draw reservoir, also to be constructed on the White River above Utah's project, will be forced to release up to 200 cfs, depending upon river flows. All of this has the potential to interfere with appropriative rights under State water laws as well as interstate apportionments under the Upper Colorado River Basin Compact.

Tarlock, *supra*, at 1-2 (quoting *Endangered Species Act Amendments, 1982: Hearing on S. 2309 Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works, 97th Cong., 2d Sess. 235-36 (1982)*); see also WESTERN STATES WATER ISSUE No. 535 (August 17, 1984) (Former Congressman Cheney stated that: "[T]he Endangered Species Act has gone beyond its original purpose and will stop water projects in the West. It even runs the risk of redoing all of the interstate compacts governing which state gets what share of available water supplies.")

The 1982 amendment to the Act granted to local water agencies, such as Petitioners Horsefly Irrigation District and Lingell Valley Irrigation District, special status in obtaining federal cooperation in resolving water resource management issues with minimal conflict with

the Act. Thus, these agencies have a unique interest that is recognized by the terms of the Act. Notwithstanding this unique interest, the Court of Appeals interpreted the Act's Citizens Suit provision narrowly by applying to Petitioners the zone of interests test. This interpretation frustrates the Congressional policy of promoting cooperation between federal agencies and local agencies in resolving issues involving water resources. Indeed, the Court of Appeals' decision renders local agencies with jurisdiction over water resources powerless to protect their interests.

III. PRUDENTIAL STANDING IS INAPPLICABLE TO PETITIONERS WHO STAND IN PLACE OF THE AGENCY DIRECTLY REGULATED.

In its opinion, the Court of Appeals acknowledged that the prudential standing doctrine embodied in the zone of interests test does not apply in circumstances where the litigants stand in the same position as the entity regulated directly. 63 F.3d 920 n. 6 (citing *Clarke*, 479 U.S. at 400). In the circumstances of this case, the Petitioners stand in the position of the entity directly regulated. Indeed, *only* Petitioners, or others similarly situated, have an interest in seeking to enforce the purposes for which Congress amended the Act.

Pursuant to the Reclamation Act of 1902, the right to the use of water acquired by the Bureau under provisions of the Federal reclamation law is appurtenant to the land irrigated. 43 U.S.C. § 372. One district court has analogized the relationship between a water user and the

Bureau to the relationship between an owner of property and a lienholder:

The water rights on the Newlands Project covered by approved water right applications and contracts are appurtenant to the land irrigated and are owned by the individual landowners in the Project. . . . The United States may have title to the irrigation works, but as to the appurtenant water rights it maintains only a lienholder's interest to secure repayment of the project construction costs.

United States v. Alpine Land and Reservoir Co., 503 F. Supp. 877, 879 (D. Nev. 1980), *modified*, 697 F.2d 851 (9th Cir.), *cert. denied*, 464 U.S. 863 (1983); *see also Nevada v. United States*, 463 U.S. 110, 124 (1983); *Ickes v. Fox*, 300 U.S. 82, 94-95 (1937).

In this case, Clear Lake and Gerber Reservoirs were constructed and historically operated to provide irrigation water to farmers and ranchers in southern Oregon, including Petitioners. Complaint, ¶¶ 9-12. The water left in these reservoirs as a result of the consultation between the Bureau and the Fish and Wildlife Service was water which Petitioners were entitled to use, 43 U.S.C. § 372, and in reality, it is Petitioners who are the subject of the contested regulatory action. For this additional reason, the application of the prudential standing rule to Petitioners is inappropriate.

In the circumstances of this case, the directly regulated agency is a sister agency of the regulator within the Department of Interior and therefore, it is almost inconceivable that the Bureau would bring and diligently prosecute an action to enforce the Act. Petitioners, on the

other hand, are in reality the "object of the action . . . at issue." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Petitioners have the greater interest in enforcing the Act, and the zone of interests test should not bar their action.

IV. THE ZONE OF INTERESTS TEST SHOULD CONSIDER AN ACT OF CONGRESS AS A WHOLE RATHER THAN RELY ON JUDICIAL INTERPRETATION OF AN ACT'S PRIMARY PURPOSE.

This Court has warned lower courts of the dangers of focusing solely on the broad purpose of a statute and ignoring its individual sections. In *Rodriguez v. U.S.*, 480 U.S. 522 (1987) (*per curiam*), the Court explained:

[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.

Id. at 525-526 (emphasis in original).⁶

⁶ More recently, in dissent in *Babbitt v. Sweet Home Ch. of Commun. for Great Or.*, ___ U.S. ___, 115 S.Ct. 2407, 2426 (1995), Justice Scalia noted:

Deduction from the "broad purpose" of a statute begs the question if it is used to decide by what *means* (and hence to what *length*) Congress pursued that purpose; to get the right answer to that question there is no substitute for the hard job (or in this case, the quite simple one) of reading the whole text. "The act must

In this case, the Court of Appeals held "that only plaintiffs who allege an interest in the *preservation* of endangered species fall within the zone of interests protected by the ESA." 63 F.3d at 919 (emphasis in original). In reaching this conclusion, the Court observed:

The overall purposes of the ESA are singularly devoted to the goal of ensuring species preservation; they do not embrace the economic and recreational interests that underlie the plaintiffs' challenge.

Id. at 920. From this statement, it is apparent that the Court of Appeals focused on a single purpose of the Act in conducting its analysis, and it did not consider relevant to its inquiry the limitations on or means of achieving that purpose specified by Congress.

Had the Ninth Circuit considered these limitations and means, it would have discovered that Congress did attempt to require federal agencies to consider the impacts on persons affected by regulation under the Act in their decision making. In Section 4(b)(2), for example, one of the sections which Petitioners sought to enforce, Congress directed the Secretary to "tak[e] into consideration the economic impact . . . of specifying any particular area as critical habitat" when designating critical habitat. 16 U.S.C. § 1533(b)(2). This section, among others, was added to the Act in 1978:

[T]o retain the basic integrity of the Endangered Species Act, while introducing some flexibility

do everything necessary to achieve its broad purpose" is the slogan of the enthusiast, not the analytical tool of the arbiter. (Emphasis added.)

which will permit exemptions from the Act's stringent requirements. At the same time, the legislation aims to improve the listing process and the public notice process of proposed listing and designations. These improvements will insure that all listing and designations are made by the Department of Interior only after a thorough survey of all of the available data, and only after notice to the local communities that will be most affected by any listing or designation. . . .

H.R. REP. NO. 1625, 95th Cong., 2d Sess. 14 (1978), reprinted in 1978 U.S.C.C.A.N. 9453, 9464.

In analyzing the 1978 amendment to the Act, the House Report further stated:

Up until this time, the determination of critical habitat has been purely a biological question. With the addition of this new paragraph, the determination of critical habitat for invertebrate takes on significant added dimensions. Economics and any other relevant impact shall be considered by the Secretary in setting the limits of critical habitat for such a species. . . .

[T]he result of the committee's proposed amendment would be increased flexibility on the part of the Secretary in determining critical habitat for invertebrates. Factors of recognized or potential importance to human activities in an area will be considered by the Secretary in deciding whether or not all or part of that area should be included in the critical habitat of an invertebrate species. . . .

Id. at 17, 1978 U.S.C.C.A.N. at 9467.

These statements exhibit a Congressional intent to expand the Secretary's analysis when designating critical habitat to include an analysis of a designation's impact on a community's economy. The Petitioners' economic injury falls within the "zone of interests" protected by Section 4(b)(2) of the Act. Other examples include sections 2(c)(2), 16 U.S.C. § 1531(c)(2) and 7(b)(3)(A), 16 U.S.C. § 1536(b)(3)(A), which also reflect an effort by Congress to reconcile species protection with other legitimate objectives.

Only by focusing exclusively on the primary overall purpose of the Act, and ignoring these sections, could the Court of Appeals conclude that Petitioners' interests fall outside of the zone of interests protected by the Act. Consistent with principles of construction, the Court should reject the attempt to define the "zone of interests test" simply by reference to the overall purpose of a statute. See *Rodriguez*, 480 U.S. at 525-526 (improper to assume that whatever furthers a statute's primary purpose must be the law). Moreover, the Court should reaffirm the long-standing principle of construction that all parts of a statute are to be given effect. *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) ("It is our duty to give effect, if possible, to every clause and word of a statute."). Congress' overall general purpose should not govern at the expense of the specific means and limitations adopted by Congress.

V. THE COURT OF APPEALS' APPLICATION OF THE ZONE OF INTERESTS TEST CONFLICTS WITH CONGRESSIONAL POLICY AFFORDING BROAD ACCESS TO THE JUDICIARY.

In analyzing the applicability of prudential limits on standing, the Court has held that: "Congress may, by legislation, expand standing to the full extent permitted by Art. III. . . ." *Gladstone, Realtors*, 441 U.S. at 100. Furthermore, "[w]here statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action." *Association of Data Processing Service Org.*, 397 U.S. at 154. For example, in analyzing actions under sections 810 and 812 of Title VIII, 42 U.S.C. §§ 3610 & 3612, the Court has instructed that: "[s]tanding under § 812, like that under § 810, is as broad as is permitted by Article III of the Constitution." *Gladstone, Realtors*, 441 U.S. at 109 (internal quotations and citations omitted). Similarly, the Court has approved a holding that the "a person claiming to be aggrieved" language of 42 U.S.C. § 2000e-5 evidences a congressional intent "to define standing as broadly as permitted by Article III." *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972) (citing *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442 (3rd Cir. 1971)).

As noted by one commentator, Congress has expanded standing in various areas including civil rights, consumer interests and as relevant to the present case, environmental interests. 13A CHARLES WRIGHT, ARTHUR MILLER & EDWARD COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3531.13, at 71 n. 10 (2d ed. 1984) (citing various environmental statutes). The Court has previously observed the "broad category" of potential plaintiffs encompassed

within the Federal Water Pollution Control Act. *Middlesex County Sewage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 16-17 (1981). The Court made this observation in analyzing the "citizen suit" provisions of the Marine Protection Research and Sanctuaries Act whereby it also noted that the provisions of the Marine Protection Act are almost identical to the Water Pollution Control Act. *Id.* In commenting on the House version of the 1973 Amendments to the Act, the House Report notes that the Act's proposed citizen suit provisions are "[p]arallel to that contained in the recent Marine Protection, Research and Sanctuaries Act of 1972, and is to be interpreted in the same fashion." H.R. REP. NO. 412, 93rd Cong., 1st Sess. 19 (1973). At the very least, an inference exists that Congress intended to allow suits by a "broad category" of potential plaintiffs under the Endangered Species Act.

Moreover, as enacted by Congress in 1973, the Citizens Suit provision of the Act provides that "any person" may commence a civil suit on his own behalf to enjoin the United States from violating the provisions of the Act or regulations issued thereunder. In commenting on the House version of the amendments, the House Report reiterates that this provision allows "[a]ny person . . . to seek redress involving injunctive relief for violations or potential violations of the Act." *Id.* Nothing in the history of this broad language suggests that "any person" is somehow limited to only "certain persons." Such a limiting construction conflicts with the principle that "[t]here is no presumption against judicial review and in favor of administrative absolutism . . . , unless that purpose is fairly discernible in the statutory scheme." *Association of Data Processing Service Org.*, 397 U.S. at 157. Moreover,

placing a narrow construction on the broad congressional directive of the Act casts doubt on Congress' ability to expand standing to the extent allowed by Article III, and violates this Court's directive that "at the bottom" the question of standing turns on congressional intent. *Clarke*, 479 U.S. at 400.

CONCLUSION

For the foregoing reasons, *Amici* submit that the Court should reverse the decision of the United States Court of Appeals for the Ninth Circuit affirming the dismissal of this case, and remand this case for further proceedings.

DATED: May 24, 1996

Respectfully submitted,

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21

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In the
Supreme Court of the United States
October Term, 1995

BRAD BENNETT, et al.,
Petitioners,

v.

MARVIN L. PLENERT, et al.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

**BRIEF AMICUS CURIAE
OF PACIFIC LEGAL FOUNDATION, CALIFORNIA
CATTLEMEN'S ASSOCIATION, NATIONAL
CATTLEMEN'S BEEF ASSOCIATION, THE CATL
FUND, AND POSSEE IN SUPPORT OF
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QUESTIONS PRESENTED FOR REVIEW

Under the citizen suit provision of the Endangered Species Act of 1973 (16 U.S.C. § 1540(g)(1)) "any person" may commence a civil suit on his own behalf to enjoin the United States from violating the provisions of the Act or regulations issued thereunder. The questions presented are:

1. Whether the broad standing mandated by Congress in the citizen suit provision of the Endangered Species Act is subject to a zone of interest test as a further, judicially imposed prudential limitation on standing.

2. If standing to sue under the Endangered Species Act is subject to prudential limitations, whether those limitations permit only environmental plaintiffs to challenge government conduct alleged to violate the terms of the Act or whether the claims of economic injury raised by public water suppliers and water users are also within the zone of interests protected or regulated by the Act.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES CITED	iii
INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE CASE	5
SUMMARY OF ARGUMENT	7
ARGUMENT	9
I. IN UNMISTAKABLE LANGUAGE, CONGRESS CLEARLY WAIVED PRUDENTIAL STANDING REQUIREMENTS UNDER THE ESA	9
II. A BROAD INTERPRETATION OF THE CITIZEN-SUIT PROVISION WILL ADVANCE, NOT FRUSTRATE, THE PURPOSES OF THE ESA	13
III. ECONOMIC INTERESTS ARE AMONG THOSE INTERESTS PROTECTED BY THE ESA	16
IV. PETITIONERS HAVE STANDING TO SUE UNDER THE PARTICULAR STATUTORY PROVISIONS WHICH UNDERLIE THEIR COMPLAINT	22
V. PETITIONERS HAVE PROCEDURAL STANDING TO SUE	24
CONCLUSION	27

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Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, ___ U.S. ___, 115 S. Ct. 2407 (1995) . . .	3-4
Bennett v. Plenert, 63 F.3d 615 (9th Cir. 1995)	4-7,9,11-14,16,21-22,26-27
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Douglas County v. Babbitt, 48 F.3d 1495 (9th Cir. 1995)	3,26-27
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Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979)	7,11,13
Gonzales v. Gorsuch, 688 F.2d 1263 (9th Cir. 1982)	3
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Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) .	8,23-26
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Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978)	3-4,13,16-17

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--	---

STATUTES

16 U.S.C. § 1531	3
§ 1531(b)	4-5,14
§ 1531(c)(2)	8,24-25
§ 1533	17
§ 1533(b)	14
§ 1533(b)(1)	13
§ 1533(b)(2)	6,13,23
§ 1536	19,23
§ 1536(a)	6
§ 1536(b)(3)(A)	18
§ 1539(a)(1)(B)	19
§ 1539(b)	20
§ 1539(e)(B)	20
§ 1540(g)(1)	i,4,6-7,9-10
42 U.S.C. § 4332(2)(c)	24
47 U.S.C. § 402(b)(2)	15

RULES

Supreme Court Rule 37	1
---------------------------------	---

UNITED STATES CONSTITUTION

Article III	7-8,10
-----------------------	--------

MISCELLANEOUS

124 Cong. Reg. 38,134 (1978)	18
Developer's Guide to Endangered Species Regulation (1996) .	4
Endangered Species Act of Nov. 10, 1978, Pub. L. No. 95-632, 1978 U.S.C.C.A.N. (92 Stat.) 366	17
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No. 95-813

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**BRIEF AMICUS CURIAE
OF PACIFIC LEGAL FOUNDATION, CALIFORNIA
CATTLEMEN'S ASSOCIATION, NATIONAL
CATTLEMEN'S BEEF ASSOCIATION, THE CATL
FUND, AND POSSEE IN SUPPORT OF
PETITIONERS**

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae on behalf of itself, the California Cattlemen's

Association, the National Cattlemen's Beef Association, the CATL Fund, and POSSEE. Written permission from all parties to file this brief has been lodged with the Clerk of the Court.

The California Cattlemen's Association (CCA) is a nonprofit corporation. CCA was founded in 1917 and represents the state's beef cattle industry in legislative and regulatory affairs. Beef cattle producers operate on over 40 million of California's 100 million acres of land and contribute more than \$1.5 billion to the state's economy. The beef industry provides more than 26,000 jobs in the State of California.

The National Cattlemen's Beef Association (NCBA) was created by the consolidation of the National Cattlemen's Association and the National Livestock and Meat Board/Beef Industry Council. NCBA is the national spokesperson and issues manager for all segments of the United States beef cattle industry. The NCBA represents more than 230,000 professional cattle breeders, producers, and feeders, as well as 75 affiliated state and national associations. It is the only national grassroots organization that articulates policies on behalf of the single largest holder of private property in America--the beef cattle industry. Sixteen percent of the land mass of the United States is privately owned by ranchers--approximately 371 million acres (larger than the collective size of 22 states). Through the NCBA, cattlemen work to create positive business conditions and to maintain the land from which they make their living while providing consumers with the finest beef in the world.

The CATL Fund was created to assist landowners and others similarly situated, including cattlemen, in establishing broad-based legal precedent to protect property rights, promote free enterprise, and minimize regulatory abuses. Because ranchers own or use such vast tracts of land, they are disproportionately singled out to bear the burden of

habitat preservation. Collectively, ranchers may own more endangered species habitat than any other class of Americans. Accordingly, the greatest part of the burden associated with species protection necessarily falls upon ranchers and other private landowners.

POSSEE (Protecting Our State's Stewards, Environment, and Economy) is a public interest legal fund organized to help ranchers, farmers, and other landowners who depend on California's renewable resources for their livelihood. Protecting the delicate balance between a healthy environment and a healthy economy for these stewards is the primary goal of the legal fund.

Pacific Legal Foundation is a nonprofit, tax-exempt organization incorporated under the laws of California for the purpose of participating nationally in litigation matters affecting the public interest. PLF has over 20,000 supporters nationwide. PLF policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. The Board of Trustees evaluates the merits of any contemplated legal action and authorizes such action only where PLF's position has broad support within the general community. PLF's Board of Trustees has authorized the filing of a brief *amicus curiae* in this matter. PLF has a long-standing interest in environmental issues and has participated in numerous cases involving statutory interpretation of environmental laws, including the Endangered Species Act, 16 U.S.C. § 1531, *et seq.*

For example, PLF was a party of record in *Pacific Legal Foundation v. Andrus*, 657 F.2d 829 (6th Cir. 1981), and *amicus curiae* in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, ___ U.S. ___, 115 S. Ct. 2407 (1995); *Douglas County, Oregon v. Babbitt*, Case No. 95-371; and *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) (TVA). PLF also litigated the case of *Gonzales v. Gorsuch*, 688 F.2d 1263 (9th Cir. 1982), which

involved standing under the Clean Water Act's citizen-suit provision.

Similar to the Clean Water Act, the citizen-suit provision of the Endangered Species Act (ESA or Act) provides "any person may commence a civil suit on his own behalf" to enjoin the government from violating the Act. 16 U.S.C. § 1540(g)(1). Despite the sweeping "any person" language used by Congress in this provision, the court below held only those plaintiffs have standing to sue who assert an interest in the preservation of species and, therefore, lie within the "zone of interests" protected by the ESA. *Bennett v. Plenert*, 63 F.3d 615, 619 (9th Cir. 1995). The questions presented by this case are twofold: (1) whether the Ninth Circuit was correct in applying the zone of interests test to an ESA citizen suit and (2) whether economic interests are within the zone of interests protected by the ESA.

These questions are vital to millions of Americans. As of 1995, over 900 species had been listed as threatened or endangered under the federal Endangered Species Act with over 3,000 species under consideration for listing. Developer's Guide to Endangered Species Regulation at 7 (1996). These species range from insects to mammals and are found throughout the United States. Also, many states have adopted their own endangered species acts, patterned after the federal ESA, to provide further protections to species within their borders. This has resulted in hundreds of actual and potential additional state listings.

As this Court stated in *TVA v. Hill*, 437 U.S. at 179, the Act is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." The heart of this comprehensive legislation is habitat protection. In *Babbitt v. Sweet Home*, this Court noted among the Act's central purposes is "to provide a means whereby the ecosystems upon which endangered

species and threatened species depend may be conserved". 16 U.S.C. § 1531(b). The resultant limitations on land and water use potentially affect millions of Americans. However, the lower court decision in this case effectively bars the courthouse doors to those who must bear the burden of species preservation and, therefore, have the greatest incentive to ensure government compliance with the Act.

PLF believes its public policy perspective and litigation experience in support of rational environmental protection and economic rights will provide a necessary additional viewpoint on the issues presented in this case.

STATEMENT OF THE CASE

The petitioners in this case are two ranchers and two irrigation districts in the State of Oregon that use the water from the Klamath Project for commercial and recreational purposes. The project is operated by the United States Bureau of Reclamation (Bureau). In 1992, the Bureau became concerned that the operation of the Klamath Project may harm two species of fish listed as endangered under the ESA; the Lost River sucker and the shortnose sucker. The Bureau contacted the United States Fish and Wildlife Service (FWS) to determine whether the two species of fish would be put at risk by ongoing operation of the project. FWS prepared a biological opinion which concluded "long term operation of the Klamath Project was likely to jeopardize the continued existence of the Lost River and shortnose suckers." *Bennett*, 63 F.3d at 916. Among the mitigation measures recommended to the Bureau by FWS in its opinion was that the Bureau maintain minimum water levels in the Clear Lake and Gerber Reservoirs. This would restrict water diversions by petitioners for irrigation purposes. The Bureau informed FWS it intended to comply with this recommendation.

Petitioners filed suit in the United States District Court for the District of Oregon under the ESA's citizen-suit provision, 16 U.S.C. § 1540(g)(1). Petitioners' complaint alleged there was no evidence to support FWS' determination that the sucker fish were jeopardized by the operation of the Klamath Project. To the contrary, according to petitioners, the two species of fish were reproducing successfully and, thus, were not in need of federal intervention. More specifically, the complaint charged FWS had not complied with the consultation provisions of Section 1536(a) and had failed to consider economic and other impacts of its opinion in violation of Section 1533(b)(2) and the National Environmental Policy Act (NEPA). In an unpublished opinion, the District Court concluded petitioners lacked standing to challenge the FWS determination and dismissed their suit.

On appeal, the Ninth Circuit concurred with the District Court and ruled only those plaintiffs "who allege an interest in the *preservation* of endangered species fall within the zone of interests protected by the ESA" and have standing to sue. *Bennett*, 63 F.3d at 919 (emphasis in original).¹ In so ruling, the lower court rejected the Eighth Circuit's interpretation of the Act that the ESA's broad citizen-suit provision "necessarily abrogated any zone of interests test." *Id.* at 918 n.3. According to the Ninth

¹ The Ninth Circuit only addressed the issue of whether petitioners were within the zone of interests protected by the ESA and did not determine whether they had satisfied the constitutionally based standing requirements. *Bennett v. Plenert*, 63 F.3d at 917.

Circuit, because the ESA is "singularly devoted to the goal of ensuring species preservation," plaintiffs alleging solely an economic or recreational interest do not have standing to challenge government violations of the Act. *Id.* at 920.

For the reasons stated below, amici Pacific Legal Foundation, NCBA, CCA, CATL FUND, and POSSEE, support petitioners request that this Court overturn the decision of the Ninth Circuit Court of Appeals, wherein that court applied the zone of interests test in an ESA citizen suit and found only species preservation was a protected interest.

SUMMARY OF ARGUMENT

This Court established that "[c]ongress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one 'who otherwise would be barred by prudential standing rules.'" *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). To the ESA, Congress engrafted a citizen-suit provision that allows "any person" to commence a civil suit against the federal government for alleged violation of the Act. 16 U.S.C. § 1540(g)(1). Applying the canon of statutory construction that the best evidence of congressional intent is the language used in the statute, it becomes clear that Congress intended to waive the prudential zone of interests requirement in suits filed pursuant to the ESA.

In its application of the zone of interests test, the Ninth Circuit was wrong to exclude petitioners' economic interests. Certain provisions of the Act, including those which form the basis of the complaint, evidence an express intent of Congress to protect such interests, including a mandate that the government consider economic and other relevant impacts of any critical habitat designation and that proposed project alternatives be "reasonable and prudent." Moreover, allowing petitioners to sue to vindicate their nonenvironmental interests would not frustrate the purposes of the ESA. To the contrary, Congress had some purpose in enacting an expansive citizen-suit provision. It may have been of the opinion that one likely to be economically injured by species protection programs would be the only person having a sufficient interest to bring to the attention of the courts errors of law committed by the government in implementing the Act. It is within the power of Congress to confer such standing within the limits of Article III.

Even if petitioners' claims do not fall within the zone of interests protected by the ESA, petitioners still have standing to sue. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (*Defenders*), this Court recognized the existence of a procedural right of action. Among other procedural rights, the ESA declares that "[f]ederal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species." 16 U.S.C. § 1531(c)(2). With respect to petitioner irrigation districts, this was not done. For all of these reasons, petitioners have standing to sue.

ARGUMENT

I

IN UNMISTAKABLE LANGUAGE, CONGRESS CLEARLY WAIVED PRUDENTIAL STANDING REQUIREMENTS UNDER THE ESA

The court below held:

In sum, the fact that a statute contains a citizen-suit provision does not necessarily establish that Congress intended that any particular plaintiff have standing to assert a violation.

Bennett, 63 F.3d at 919.

This statement misses the point. It is not the existence of a citizen-suit provision which decides the issue but rather the nature of that provision. The citizen-suit provision in the ESA is clear and unambiguous. It states, in pertinent part:

(g) Citizen suits

(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf--

(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation

of any provision of this chapter or regulation issued under the authority thereof

16 U.S.C. § 1540(g)(1).

The operative language is not "citizen suits" but "any person." Unless otherwise defined in the statute, and within constitutional limits, the congressional use of "any person" language in a citizen-suit provision should be deemed a waiver of all prudential standing requirements as a matter of law. It cannot be assumed that Congress did not intend what it plainly said when it adopted such language.

It should be evident that the scope of citizen-suit provisions in our environmental statutes has been the subject of vigorous litigation for decades, including the Clean Water Act, Clean Air Act, Resource Conservation and Recovery Act, Comprehensive Environmental Response, Compensation and Liability Act and, hopefully, ending with the Endangered Species Act in this case. As this case demonstrates, judicial interpretation of standing under citizen-suit provisions often results in conflicting decisions and substantial uncertainty for the regulated community. For the most part, it is unnecessary.

Justice demands that the legislative, executive, and judicial branches of government be put on notice that unless the term is specifically defined to exclude certain persons, and subject only to Article III minima, "any person" in a citizen suit provision means any person. Short of enumerating all possible plaintiffs under a citizen-suit provision, which may also be subject to interpretation, Congress could not state its intent with any greater clarity or with less equivocation than it has in the ESA. The term "any person" brooks no dispute. The lower court questioned and then rejected the plain meaning of so simple a statement

because of what it, not Congress, deemed the higher purposes of the Act.

In *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, this Court held:

Congress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one "who otherwise would be barred by prudential standing rules." In no event, however, may Congress abrogate the Art. III minima: A plaintiff must always have suffered a "distinct and palpable injury to himself," that is likely to be redressed if the requested relief is granted.

Id. at 100 (citations omitted).

The Ninth Circuit acknowledged this Court's holding in *Gladstone*, but the court clearly did not believe it.

[N]otwithstanding the broad language of the citizen-suit provision, we directly reject the plaintiffs' contention that it renders the zone of interests test inapplicable to claims brought under the ESA. Our conclusion follows from the fact that our court, and others, have regularly employed the zone of interests test in determining standing despite Congress' enactment of expansive citizen-suit provisions.

Bennett, 63 F.3d at 918.

If this Court's holding in *Gladstone* is to have any meaning, Congress must, at some point, be deemed to have

expressed its intent to "expand standing to the full extent permitted by Article III." If "any person" is not such an expression, what is?

The attempt by the Ninth Circuit to go behind the plain language of the ESA citizen-suit provision and somehow divine, through the statutory scheme, whether Congress intended to preclude any particular class of persons from seeking judicial review is a subterfuge to escape the clearly stated will of Congress. If the scope of judicial review is determined not from the clear and unambiguous language of a statute, but rather from judicial perception of the implicit intent of Congress, it is the courts and not Congress that may contract or expand standing. The Ninth Circuit had no difficulty understanding the express language of the ESA, the court simply disagreed with it. The Ninth Circuit itself decided to limit judicial review and so ignored the citizen-suit provision altogether. This is apparent from the fact that the lower court interpreted the standing requirement under the ESA in exactly the way it interpreted the standing requirement under NEPA.

Similarly, we held that plaintiffs do not have standing under NEPA to protect "purely" economic interests, because the environmental purposes of the Act would not be furthered by permitting suits premised on such interests. See *Nevada Land Action Ass'n v. U.S. Forest Service*, 8 F.3d 713, 716 (9th Cir. 1993).

Bennett, 63 F.3d at 919-20.

However, contrary to the ESA, NEPA has no citizen-suit provision. Clearly, Congress intended the ESA citizen-suit provision to mean something. In the Ninth Circuit, it means nothing. The lower court's ruling in this case would

have been the same without the citizen-suit provision. Likewise, this Court intended *Gladstone* to mean something. In the Ninth Circuit, it means nothing. If the "any person" language will not preclude the zone of interests test under *Gladstone*, virtually no language will do so.

II

A BROAD INTERPRETATION OF THE CITIZEN-SUIT PROVISION WILL ADVANCE, NOT FRUSTRATE, THE PURPOSES OF THE ESA

The lower court's rejection of petitioners' suit by the strict application of the zone of interests test turned on the court's grave concern that

[t]o interpret the statute in the manner suggested by plaintiffs would be to transform provisions designed to further species protection into the means to frustrate that very goal.

Bennett, 63 F.3d at 922.

This concern is misplaced. Surely, Congress knew it was creating the most comprehensive and, arguably, the most intrusive environmental legislation in the world. See *TVA v. Hill*, 437 U.S. at 176. Species preservation would necessarily require severe and long-lasting land and water use restrictions. For that reason, the Act requires both species status and critical habitat determinations to be made on the best scientific data available. 16 U.S.C. § 1533(b)(1) and (2). It therefore furthers, rather than frustrates, the intent of the ESA to allow citizen suits to enforce strict adherence to sound biological principles.

In the present case, petitioners assert FWS did not rely on the best scientific data available and so rendered a faulty biological opinion. Nothing could frustrate the purposes of the ESA, and undermine public confidence in the Act, more than faulty biological decisions. Such decisions are not easily reversed. Moreover, if, as the lower court believes, the ESA requires species protection "whatever the cost," it follows that our finite resources should only be brought to bear when it is biologically necessary to provide such protection. Unnecessary diversion of natural resources, in this case water flows for two thriving fish species, is both wasteful and counterproductive. Surely, this does not advance the goals of the Act.

The determination of who may bring a suit under the ESA should be left to Congress, not the judiciary. Unrestrained species preservation is not the purpose of the ESA as the Ninth Circuit supposes. ("The overall purposes of the ESA are singularly devoted to the goal of ensuring species preservation" *Bennett*, 63 F.3d at 920). Rather, well-founded, scientifically based species preservation is the purpose of the ESA. ("The Secretary shall make [listing] determinations ... and designate critical habitat ... on the basis of the best scientific data available" 16 U.S.C. § 1533(b).) Most certainly, Congress intended to assure adherence to this high standard when it granted, in the most unambiguous language imaginable, the right of any person to bring a suit against the government for failing to comply with the statute.

Those parties who fall within the zone of interests of the ESA, as defined by the Ninth Circuit (*i.e.*, those who allege an interest in the preservation of species), have a far greater incentive to see that species are favored than to ensure proper legal or even scientific protocols are followed. In contrast, those parties the Ninth Circuit has determined

fall outside the zone of interests of the ESA (*i.e.*, those who allege economic concerns) bear the actual burden of species preservation and have a vested interest to see that both the spirit and letter of the law are followed.

This Court acknowledged the value of enforcement by those with interests ostensibly averse to the general purpose of a statute in *Sierra Club v. Morton*, 405 U.S. 727 (1972). In *Sierra Club*, this Court cited with favor *Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940), for the following:

Congress had some purpose in enacting section 402(b)(2). It may have been of opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license. It is within the power of Congress to confer such standing to prosecute an appeal.

Id. at 477.

Title 47, United States Code 402(b)(2), referred to a broad citizen-suit provision of the Communications Act of 1934 that provided for an appeal to the Court of Appeals of the District of Columbia (1) by an applicant for a license or permit, or (2) by any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application. *Id.* at 476-77. In *Sanders*, petitioner argued, much like the Ninth Circuit in the present case, that since economic injury to the respondent was not a proper issue before the Commission, "it is impossible that section 402(b) was

intended to give the respondent standing to appeal." *Id.* at 477. However, to ensure a check on the actions of the licensing commission, this Court found that a competitor had standing to protect economic interests and held the government's view "would deprive subsection (2) of any substantial effect." *Id.* at 477. So it is in this case; those with economic interests are virtually the only persons having a sufficient interest to bring to the attention of the courts errors of law in the Secretary's implementation of the ESA.

The ESA citizen-suit provision should be interpreted not grudgingly but as serving a broadly remedial purpose. There is a greater public interest in ensuring compliance with the Act than in limiting access to the courts. An unwarranted listing of a species or unnecessary mitigation does not advance the interests of the Act or the American people.

III

ECONOMIC INTERESTS ARE AMONG THOSE INTERESTS PROTECTED BY THE ESA

The court below held the overall purposes of the ESA are singularly devoted to the goal of ensuring species preservation and that the Act does not embrace or protect economic interests. *Bennett*, 63 F.3d at 920. This holding is incorrect. The Ninth Circuit based this holding on this Court's decision in *TVA v. Hill* wherein this Court concluded:

The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. That is reflected not only in the stated policies

of the Act, but in literally every section of the statute.

TVA v. Hill, 437 U.S. at 184.

If that was true of the ESA then, it certainly is not true today. This Court decided *TVA v. Hill* in June of 1978. In November of the same year, the Act was amended by Congress for the express purpose of requiring a consideration of costs and other impacts in species protection. Congress amended Section 4 (16 U.S.C. § 1533) of the Act to direct that

[i]n determining the critical habitat of any endangered or threatened species, the Secretary shall consider the economic impact, and any other relevant impacts, of specifying any particular area as critical habitat, and he may exclude any such area from the critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species.

Endangered Species Act of Nov. 10, 1978, Pub. L. No. 95-632, 1978 U.S.C.C.A.N. (92 Stat.) 366.

This amendment speaks for itself; the Secretary is to consider, and therefore protect, economic and other interests in habitat designations. The legislative history also supports this plain reading of the text. In House debates, the amendment's author, Representative Leggett, stated:

The Endangered Species Act has been criticized because it allows for no consideration of the economic impact of listing a species or designating critical habitat. Although H.R. 14104 retains the Act's stringent mandate, it does introduce a consideration of economic impact in several respects [T]he bill includes a provision which requires the Secretary to evaluate the economic impact of designating critical habitat

124 Cong. Rec. 38,134 (1978) (statement of Rep. Leggett).

In 1978, Congress also amended Section 7 of the ESA to require the Secretary to suggest "reasonable and prudent alternatives" for a federal project the Secretary determined, after consultation, may cause jeopardy to a listed species. 16 U.S.C. § 1536(b)(3)(A). Use of the term "reasonable and prudent" suggests a congressional intent that the Secretary weigh competing economic and other interests in rendering a biological opinion just as the Secretary is required to do in designating critical habitat.

Congress did not stop there, however. In 1982, Congress again amended the ESA in an attempt to provide more economic protection under the Act. The most significant amendments added in 1982 created an exemption process to the ESA's taking prohibition which one commentator noted, "is the principle way in which economic considerations are intended to factor into application of the ESA." Ike Sugg, *Caught in the Act: Evaluating the Endangered Species Act, Its Effects on Man and Prospects for Reform*, 24 CUMB. L. REV. 1, 37 (1993). The exemption process created the Endangered Species Committee, which is allowed to circumvent the strict takings prohibitions of the

ESA if such action is found to be in the public interest. 16 U.S.C. § 1536.

The 1982 amendments also offered relief to private property owners and other persons that might otherwise be adversely affected by strict compliance with the ESA's provisions. The amendments allowed for the "incidental" taking of a listed species. 16 U.S.C. § 1539(a)(1)(B). An incidental taking is the taking of a species that occurs as the by-product "of carrying out an otherwise lawful activity." *Id.* With the Secretary's permission, such incidental takings are not considered a violation of the ESA. The legislative history behind this provision provides clear evidence of what Congress intended:

The legislation establishes a procedure whereby those persons whose actions may affect endangered or threatened species may receive permits for the incidental taking of such species, provided the action would not jeopardize the continued existence of the species. *The provision addresses the concerns of private landowners* who are faced with having otherwise lawful actions not requiring Federal permits prevented by Section 9 prohibitions against taking.

H.R. Rep. No. 567, 97th Cong., 2nd Sess. (1982) (emphasis added).

Obviously, Congress recognized that the interests of landowners may conflict with the goal of conservation. Rather than adopt a hard and fast rule against the "taking" of a species, Congress instead chose to steer a middle course between these two competing interests and adopted this

balancing approach to the problem. Thus, economics and reasonable property uses were made protectable interests under the ESA.

This balancing approach is also found in the ESA amendments allowing for hardship exemptions. 16 U.S.C. § 1539(b). If the listing of a species will cause undue economic hardship to an individual who has entered into a commercial contract regarding that species, the Secretary may exempt that individual from the application of the ESA. *Id.* In addition, this subsection makes special allowances for natives of Alaska, provided the taking is "primarily for subsistence purposes." 16 U.S.C. § 1539(e)(B). Congress understood that many legitimate and important economic human activities could be severely affected by an unbridled attempt to preserve species, so it sought to provide countervailing protections by amending the Act. The reasoning employed by the Ninth Circuit in this case fails to recognize Congress' attempt to protect and preserve economic interests.

Any doubt as to the intent behind the 1982 amendments vanishes upon reading the legislative history supporting those amendments. The House Report accompanying the 1982 amendments details the goals sought to be achieved by the Act:

The Endangered Species Preservation Act of 1966 and the Endangered Species Conservation Act of 1969 preceded the 1973 Act to address the same problem, but it was the last statute which constructed a

comprehensive means to *balance economic growth and development with adequate conservation measures.*

H.R. Rep. No. 567, 97th Cong., 2nd Sess. (1982) (emphasis added).

The legislative history also traces the evolution of the ESA from 1973 through 1982:

Subsequent to its passage, the Act was amended in 1976, 1978 and 1979 to increase the *flexibility in balancing species protection and conservation with development projects.*

Id. (emphasis added).

Economic protection under the ESA reached its zenith with the 1982 amendments. The provisions added in that year, as well as the legislative history explaining those provisions, demonstrate beyond all doubt that economic interests are within the zone of interests protected and regulated by the ESA.

The Ninth Circuit's cavalier rejection of petitioners' economic interests as protectable interests under the ESA is untenable. In amending the Act to include economic and other considerations, Congress was obviously responding to public and judicial perception that the ESA required species protection "whatever the cost." These amendments were designed to change that perception by changing the Act. These, and other, provisions simply do not permit the interpretation given the Act by the Ninth Circuit that the overall purposes of the ESA "do not embrace the economic and recreational interests that underlie the plaintiffs'

challenge." *Bennett*, 63 F.3d at 920. The Act was modified expressly to embrace such interests.

IV

PETITIONERS HAVE STANDING TO SUE UNDER THE PARTICULAR STATUTORY PROVISIONS WHICH UNDERLIE THEIR COMPLAINT

Even if the language of the ESA, as amended, is not enough to bring petitioners within the "zone of interests" of the Act as a whole, petitioners would still have standing to sue under the habitat designation and biological consultation provisions on which their claims rest. In its decision below, the Ninth Circuit cited this Court's holding in *Clarke v. Securities Industry Association*, 479 U.S. 388 (1987), for the following:

Clarke explains that the zone of interests test simply provides a method of determining whether Congress intended to permit a particular plaintiff to bring an action. As the *Clarke* Court made clear, "at bottom the reviewability question turns on congressional intent, and all indicators helpful in discerning that intent must be weighed." Thus *Clarke* concludes that the statutory purposes should be devined by considering the particular statutory provision that underlies the complaint within "the overall context" of the act itself.

Bennett, 63 F.3d at 918 (citation omitted).

In *Lujan v. National Wildlife Federation*, 497 U.S. 871, this Court expressed the *Clarke* standard of review this way:

[W]e have said ... the plaintiff must establish that the injury he complains of ... falls within the "zone of interests" sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.

Id. at 883.

The Ninth Circuit departed from this standard in that it focused on the "overall context" of the Act to the exclusion of the particular statutory provisions that underlie the complaint. As basis for this suit, plaintiffs claim FWS violated Subsection 1533(b)(2), which incorporates the amended congressional mandate that the Secretary designate critical habitat "after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." Petitioners also claim FWS violated 16 U.S.C. § 1536 in rendering a faulty biological opinion and suggesting unjustified alternatives to the federal project.

As discussed in the previous argument, the express language of these sections, the intent of the author, and the circumstances surrounding the inclusion of these provisions in the Act allow only one possible interpretation; Congress intended to protect economic and other relevant interests. Ultimately, the only way to ensure protection of these interests is by enforcement. It follows, therefore, that Congress intended to permit plaintiffs with economic and other relevant interests to bring an action against the federal government under the ESA, at least with respect to these particular statutory provisions if not for all purposes.

PETITIONERS HAVE PROCEDURAL STANDING TO SUE

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, this Court recognized the existence of a procedural right of action.

We do *not* hold that an individual cannot enforce procedural rights; he assuredly can, so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing.

Lujan v. Defenders of Wildlife, 504 U.S. at 573 n.8 (emphasis in original).

It is apparent from the foregoing that to establish procedural standing under *Defenders*, petitioners must establish (1) that they are persons who have been accorded a procedural right to protect their concrete interests, and (2) that petitioners have some threatened concrete interests that are the ultimate basis of their standing. Put another way, petitioners must seek "to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs." *Defenders*, 504 U.S. at 572.

Under NEPA, petitioners are accorded a procedural right to an Environmental Impact Statement for major federal actions significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(c). Also, the ESA policy that "federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species," 16 U.S.C.

§ 1531(c)(2), accords petitioners a procedural right to consultation before federal agency action.

Respondents have failed to follow these mandated procedures. In consequence of these procedural failures, petitioners have suffered discrete injuries: (1) the restrictions on lake levels imposed in the Biological Opinion adversely affect petitioners by substantially reducing the quantity of available irrigation water; and (2) by imposing restrictions on water levels in Clear Lake and Gerber Reservoirs, the Biological Opinion implicitly determines critical habitat for the endangered suckers. The designation of critical habitat is a major federal action to which NEPA procedural requirements apply. See Complaint for Declaratory and Injunctive Relief (Complaint), Paragraphs 21-23.

It is evident that, contrary to the generalized grievance of the environmental groups in *Defenders*, petitioners in this case seek to protect separate, concrete interests. In fact, this case is very much like the situation this Court described in *Defenders* for which this Court would, presumably, find procedural standing.

There is this much truth to the assertion that "procedural rights" are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case-law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an Environmental Impact Statement, even though he cannot establish with any certainty that the Statement will cause the license to be withheld

or altered, and even though the dam will not be completed for many years.

Defenders, 504 U.S. at 572 n.7.

In this case, the Ninth Circuit chose not to address the issue of petitioners' procedural standing.

We note the zone of interests test applies even to plaintiffs who have established constitutional standing premised on a procedural injury. See *Douglas County v. Babbitt*, 48 F.3d 1495, 1500-01 (9th Cir. 1995) (applying the prudential zone of interests test after concluding that the plaintiffs had procedural standing to assert a claim) (citations omitted); *Yesler Terrace Community Council v. Cisneros*, 37 F.3d 442, 447 (9th Cir. 1994) (same). Accordingly, we need not address whether the plaintiffs have procedural, or as it is sometimes known, "footnote seven" standing. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570-73 n.7, 112 S. Ct. 2130, 2142-2143 n.7. See also *Hazardous Waste Treatment Council v. Thomas*, 855 F.2d 918 n.2 (D.C. Cir. 1989) (explaining that standing may be decided on prudential grounds without first undertaking the constitutional inquiry).

Bennett, 63 F.3d at 917, n.1.

Beyond the identification of a concrete procedural right and an actual threat to that right, the Ninth Circuit has added a third element to procedural standing--the zone of interests. As authority for this proposition, it cites itself.

The lower court does not, because it cannot, rely on any precedent of this Court for its interpretation of procedural standing requirements. The Ninth Circuit merely imposes fresh limitations on the constitutional authority of Congress to allow citizen-suits in the federal courts under environmental statutes for injuries deemed "procedural" in nature.

In *Idaho Farm Bureau Federation*, the Idaho District Court examined the Ninth Circuit precedent on procedural standing, including *Bennett* and *Douglas County*, and frankly concluded the Ninth Circuit never specified the origin of this "zone of interest" requirement. *Idaho Farm Bureau Federation*, 900 F. Supp. 1349, 1361 (D. Idaho 1995). It certainly cannot be inferred from *Defenders*. This Court did not address the issue. However, the issue is easily resolved. The zone of interests test does not apply to procedural standing. A procedural right of action is distinct from a right of action arising from protectable substantive rights found in the zone of interests. The ultimate test is, simply, as this Court stated in *Defenders*, whether petitioners seek "to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs." *Defenders*, 504 U.S. at 572. That this test is satisfied in the present case there can be no doubt.

CONCLUSION

The lower court decision is much more than a proverbial "blank check." It is an invitation to government abuse. Under *Bennett*, the federal government can act (even illegally) with virtually no accountability so long as it acts in the name of species protection. Whatever this Court infers from the language of the Act, it cannot suppose that Congress intended no possibility of redress for illegal government actions by those few individuals who must

shoulder the public burden of species protection. A federal District Court recently recognized the absurdity of this result.

The court is unwilling to adopt the view that FWS is unrestrained if it cloaks any of its acts in the laudable robe of endangered and threatened species protection. This is a form of totalitarian virtue--a concept for which no precedent has been advanced and which is foreign to the rule of law.

Mausolf v. Babbitt, 913 F. Supp. 1334, 1342 (D. Minn. 1996).

For the foregoing reasons, this Court should overturn the Ninth Circuit decision and allow meaningful application of the ESA citizen-suit provision.

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Respectfully submitted,

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